IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

— VS. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richard Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
HAMILTON, GIBSON, NICKELSEN,
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

INDEX

AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

— VS. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Kaiser Aetna, Hawaii-Kai Development Co., and the individual Trustees of the Bernice P. Bishop Estate[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 11, 1978.

[1] In this Petition, Kaiser Aetna and Hawaii-Kai Development Co. will be referred to collectively as "Kaiser Aetna", and Bernice P. Bishop Estate and its Trustees will be referred to collectively as "the Trustees".

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the District of Hawaii, reported at 408 F. Supp. 42 (D. Haw. 1976), appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 11, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Ninth Circuit Court of Appeals erred in holding Kuapa Pond, a uniquely private body of water, a "navigable water of the United States" subject to a federal public navigation servitude?

2. Whether the Ninth Circuit Court of Appeals erred in finding federal regulatory authority over navigable waters and the right to mandate free public access inseparable?

3. Whether the imposition of a public navigation servitude in these circumstances constitutes a taking of private property without just compensation contrary to the fifth amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Const., amend. V.

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.

Organic Act, § 95, codified as 48 U.S.C. § 506.

> That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated.

Organic Act, § 96, codified as 48 U.S.C. § 507.

The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Act of July 7, 1898, 30 Stat. 750-51.

All fisheries in the sea waters of the State not included in any fish pond or artificial inclosure shall be free to the public, subject to vested rights and the right of the State to regulate the same.

Hawaii Const., art. X, § 3.

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other

water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403, Section 10, Rivers and Harbors Act of 1899.

Statement of the Case

Kuapa Pond, one of at least one hundred forty-two Hawaiian fish ponds of prehistoric origin, is a unique example of private property. The people of Hawaii have regarded fish ponds as private property for centuries with the right to exclude all others from as early as 1350. The Corps of Engineers presently seeks to disregard these private property rights by declaring the pond a "navigable water of the United States," subject to the imposition of a federal public navigation servitude.

The Hawaiian Kingdom invariably dealt with fish ponds as part of the dry land, a portion of the private property of the regional chiefs. In 1848, King Kamehameha III pronounced the Great Mahele, or national land distribution, to dissolve feudal land holdings. Fish ponds were distributed with adjacent fast lands, and titles to fish ponds were recognized to the same extent and in identical manner as the fast lands. Ownership of the pond by the

Trustees dates from a Royal Patent issued pursuant to the Great Mahele.

The pond originally covered 523 acres and extended approximately two miles inland from adjacent Maunalua Bay, an arm of the Pacific Ocean. It was characterized by shallow waters and separated from adjacent ocean waters by a permeable natural sandbar reinforced with stone walls. It had two narrow openings to Maunalua Bay, in which were placed sluice gates to prevent the mullet raised in the pond from escaping to the open sea. Boat travel to the open sea was not possible due to the barrier beach formation. The pond remained in this state until it and the surrounding fast lands began to be developed in 1961 pursuant to an agreement between Kaiser Aetna and the Trustees granting master development rights to 6,000 acres now popularly known as Hawaii Kai.

The agreement specifically pertaining to Kuapa Pond never contemplated public access and was subject to a declaration of protective provisions granting each lessee of a marina lot a non-exclusive easement for purposes of navigation and access to the sea, together with the Trustees and others to whom the Trustees grant licenses and permits.

Access to the pond has been reserved to waterfront lot lessees and boat owners paying an annual fee. The public has always been excluded. No suggestion of the applicability of a public navigation servitude arose until Kaiser Aetna had invested substantial funds developing the pond and the surrounding areas with amenities suitable for small pleasure boating. Kuapa Pond remains today what it has been throughout Hawaiian history, private property, and for all legal purposes the equivalent of fast land.

At present, approximately 668 recreational boats are authorized to use the pond. Maintenance financing is accomplished by collection of an annual $72.00 fee from approximately 1,500 marina lot lessees, 86 non-marina lot lessees, and 56 nonresident boat owners. Maintenance is coordinated by Kaiser Aetna. Commercial use has not been permitted, with a minor exception of one small passenger vessel used for a brief time to promote residential sales and attract visitors to a regional shopping center.

The right to improve Kuapa Pond by creating a privately controlled marina-style residential community is integrally related to Kaiser Aetna's long-range comprehensive plan for housing, educational and recreational opportunities. A decade of carefully planned development has yielded a marina-style residential community of approximately 22,000 persons. The Corps of Engineers has been aware at all times of the dredging and filling operations in and contiguous to the pond, and never required permits or purported to have any regulatory authority until the early 1970's. The Corps had consistently listed the pond as a private marina.

Development pursuant to the master plan did not destroy the inherent characteristics of the pond. Adjacent lands were graded, the pond was dredged and filled, but the barrier beach, reinforced early in this century to support a roadway, still exists. Although the pond has been dredged to a depth of six to eight feet, and the opening to the bay improved so pleasure boating is now possible, the appearance, size and character of the pond is not radically dissimilar to circumstances prior to these activities.

As a result of the above-described conflict, the Army Corps of Engineers sought declaratory judgment in federal court in the District of Hawaii to establish regulatory

authority under § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1970) and an injunction granting public access to Kuapa Pond. The District Court upheld regulatory jurisdiction but denied the injunctive relief. Both parties appealed. The Ninth Circuit Court of Appeals affirmed the District Court's finding of regulatory jurisdiction, but reversed its denial of injunctive relief. Jurisdiction in both courts below was invoked because the questions arose under the federal Rivers and Harbors Act.

Reasons for Granting the Writ

1. The Circuit Court erred in finding Kuapa Pond a "navigable water of the United States" for purposes of imposition of a federal navigation servitude.

The term "navigable waters of the United States," employed traditionally to identify waters subject to federal regulation and admiralty jurisdiction, is so inherently unworkable with regard to Hawaiian fish ponds that it does not represent a meaningful or equitable standard under which public and private rights may be determined. The historical designation is legally unsupportable when applied to waters which have been recognized to be private by the express and unambiguous acts of Congress. At least one hundred forty-two fish ponds exist in modern Hawaii; the impact of this decision is potentially far-reaching.

Despite development activities resulting in internal modifications, the status of the pond remains unchanged, that is, the pond is still a fish pond, and as such is still private property. The controlling principle was expressed succinctly in Hawaii Attorney General's Opinion 57-159 (Dec. 12, 1957). "Until it becomes judicially established

that title to such private property [fish ponds] has been lost by the owner thereof by adverse possession, prescription and erosion . . . or some other legal means, the fishpond remains private property." *See also Application of Kamakana*, 58 Haw. Adv. No. 5860, 574 P.2d 1346 (1978), wherein the State of Hawaii's claim by adverse possession to a privately held fish pond was denied, and the court held legal title, equivalent to title to fast lands, to remain with the private landholder. The owners have never abandoned, transferred, conveyed or otherwise given up any title to the pond.

To a certain extent the Government admits to the continued existence of the pond *qua* pond. With significant inconsistency the Government denies private status, arguing the pond had been destroyed by development work, while at the same time admitting that petitioners have a continuing right to exclude the public from fishing or from acting in any manner that might interfere with the exclusive right to fish. This inconsistency results from a fundamental misapprehension of the vested right to title existing at the moment of Hawaiian annexation by the United States.

The District Court properly found Kuapa Pond never to have been "servient to any 'navigation servitude,'" and held that its owners had the right to exclude the public.

> The theory that the federal government holds a stewardship over all navigable waters in a United States territory prior to its being admitted to statehood . . . , may be valid for lands obtained from a foreign government where there is no history of legally authorized private proprietorship over certain waters therein. Where, just as here under the Hawaiian Kingdom, property rights have been estab-

> lished by a government prior to purchase or annexation of the lands howe er, those private property rights survive if they are recognized in and by the instrument of annexation.

See p. 27a of Appendix hereto; 408 F. Supp. at 51-52. The Ninth Circuit improperly applied the designation, ignoring uniquely vested private property rights in the beds, banks, and waters of Kuapa Pond.

The District Court did not rely on state law to deny the public servitude. It simply recognized that rights of private property vested under a prior government survive annexation if, as here, they were recognized by the federal government upon annexation. The District Court properly cited *Knight* v. *United States Land Ass'n*, 142 U.S. 161 (1891), wherein the United States had confirmed title to lands based on treaty against a claim based on a California grant. In that case, this Court discussed conflicting claims to reach the following conclusion:

> It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. [Citations omitted.] Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory. . . . ***But this doctrine does not apply to lands that had been previously granted to other parties by the former government,*** or subjected to trusts which would require their disposition in some other way. *San Francisco* v. *Le Roy*, 138 U.S. 656. For it is equally well settled that ***when the United States acquired California from Mexico by . . . treaty . . . , they were bound . . . to protect all rights of property in that territory emanating from the Mexican government previous to the treaty.*** [Citation omitted.]
>
> *Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same.* [Citations omitted.]
>
> These observations lead directly to the determination of the force and effect of the title of the pueblo of San Francisco, derived from the former government of Mexico, as opposed to the title which it is insisted passed to the State of California upon its admission into the Union by virtue of its sovereignty over all tide lands in the State below the high-water line, even including such as are situated within the limits of the pueblo.

142 U.S. at 183-84 (emphasis added). *See also San Francisco* v. *Le Roy*, 138 U.S. 656 (1891). It is clear that titles derived from Mexico in these cases were valid against the United States and the State of California, as well as against other private parties. *See Knight*, 142 U.S. at 184, 188-89; *Le Roy*, 138 U.S. at 671.

The District Court held that only waters subject to the reservation of stewardship in favor of the federal government are available for the imposition of the public servitude. The Ninth Circuit, however, relying on the *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), to define the broad reach of the federal powers

over waters, viewed the present conflict as being between federal and local law. This misapprehends the facts. A conflict meriting Supreme Court resolution exists between federal laws developed by the Supreme Court and the Congress at various stages in our national development.

Critical to a proper analysis of *Appalachian* and other cases cited to support the Ninth Circuit opinion is recognition that the issues before those courts focused on the regulatory powers of the federal government, not the imposition of the public servitude. Courts have not addressed the primary issue herein—whether free public access necessarily follows in all circumstances where a federal regulatory power over navigable waters exists.

The Act of Congress annexing the Hawaiian islands recognized the unique property law system of the Hawaiian Kingdom and Republic, under which fish ponds were considered legally identical to dry land. Act of July 7, 1898, 30 Stat. 750-51. Thereafter, enacting comprehensive legislation for the governance of the new Territory, Congress repealed all prior rights in sea fisheries, *subject to vested rights,* but specifically protected fish ponds from any change in status.

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the seawaters of the Territory of Hawaii *not included in any fish pond or artificial enclosure* shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.

Organic Act, § 95, codified as 48 U.S.C. § 506 (emphasis added). Protection continued after Statehood with similar provisions in Article X, Section 3, of the Hawaiian Constitution.

Pre- and post-annexation decisions of the Supreme Courts of the United States and Hawaii confirm the unique status of the fish ponds. The Ninth Circuit improperly held that cases in Hawaiian courts were irrelevant, and the following Supreme Court decisions were disregarded altogether.

In *Damon* v. *Hawaii,* 194 U.S. 154 (1904), Justice Holmes wrote:

> A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as *property and a vested right* than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, *however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.* (Citation omitted.)

194 U.S. at 158 (emphasis added). *See also Carter* v. *Hawaii,* 200 U.S. 255 (1906).

These cases establish that under Royal Patents and statutes and usage of the Hawaiian Kingdom vested rights in sea fisheries were created. The District Court correctly noted that these cases, while not involving fish ponds, do "constitute a federal recognition of peculiar rights arising out of Hawaii's unique feudal system of property rights."

The District Court therefore was correct in concluding Hawaiian fish ponds are private—not public—waters over which no public navigation servitude may extend.

Hawaiian case law is relevant to reinforce the proposition that fish ponds have never been regarded as other than private property. *See Haalelea* v. *Montgomery,* 2 Haw. 62 (1858) (when settling a dispute over a warranty deed given by High Chief Kekauonohi, sea fishing rights in the open waters were challenged, but title to the fish ponds were not); *In re Boundaries of Pulehunui,* 4 Haw. 239 (1879) (settlement of a boundary dispute included assignment of various fish ponds among the parties); *Kapea* v. *Moehonua,* 6 Haw. 49 (1871) (in settling accounts the court mingled references to fish ponds, house lots and taro patches without distinction; rental fees for a fish pond were set); *Murphy* v. *Hitchcock,* 22 Haw. 665 (1915) (dealing with the lease of a fish pond as an estate for years in realty); *Palama* v. *Sheehan,* 50 Haw. 298, 440 P.2d 95 (1968) (decree quieting title in an 18-acre fish pond and the surrounding area). Fish pond status is aptly summed up in the dictum of *Harris* v. *Carter,* 6 Haw. 195, 197 (1877):

> . . . If a man sells his house-lot, the conveyance will be held to include the fountain or the garden which is in the house-lot.
>
> So a grant of an Ahupuaa [Hawaiian land unit] will include the grantor's fishponds or kalo patches lying within the Ahupuaa.

This dictum has been reaffirmed recently by the Hawaii Supreme Court in *Application of Kamakana,* 58 Haw. Adv. No. 5860 at 7, 574 P.2d at 1350.

The private nature of Kuapa and similar ponds precludes the imposition of the federal public navigation servitude, and the Ninth Circuit decision granting public access is contrary to congressional and Supreme Court recognition of the existence of private waters over which the United States has retained no reservation.

2. A limited federal regulatory authority over activities in Kuapa Pond is separable from the imposition of the public navigation servitude.

The District Court recognized that the Corps of Engineers may have some regulatory powers under the Rivers and Harbors Act of 1899, Section 10, 33 U. S. C. § 403, over waters not subject to a public navigation servitude.

> There is nothing inconsistent between the Hawaiian law of private ownership of fishponds and the federal power over navigation because the latter was merely a surrender of jurisdiction by the states of powers inherited from the Crown or acquired by the "equal footing" doctrine—only to the extent the states had jurisdiction over waters to surrender. The Kingdom of Hawaii never claimed jurisdiction over fishpond waters. (Citation omitted.)

See p. 27a of Appendix hereto; 408 F. Supp. at 52, n. 24.

Authority arguably exists to regulate dredging activity to insure against impairment of navigability in nearby Maunalua Bay. An appreciation of this potential explains Kaiser Aetna's efforts to cooperate following the Corps of Engineers' 1972 decision to require permits for dredging and related activities.

This regulatory authority can be analogized to zoning regulation where an owner's right to use land may be con-

trolled to further area-wide aesthetic, economic and social goals. Courts have extended zoning controls far beyond their original scope, but even in the area of historic preservation, an area in which the general public has demonstrated a particularly active interest, courts have not seen fit to declare buildings subject to regulation open to the public. *Cf. Penn Central Transportation Co.* v. *City of New York*, 46 U.S.L.W. 4856 (1978) (extensive zoning controls upheld).

Further, this honorable Court in the *United States* v. *Texas*, 339 U.S. 707, 718-19 (1950), recognized that "dominium and imperium are normally separable and separate. . . ." Therein the issues revolved around marginal seawater bed title, and the concept of separateness was rejected because of national responsibilities for shorelines abutting international waters. The outcome, however, does not defeat the importance of this Court's acknowledgment that proprietary rights and regulatory authority can coexist without regulation swallowing up and obscuring that most dear quality of private rights, the right to determine who shall be permitted access.

An analogous question arose in connection with a proposal by the United States for a waterway from Utica, Illinois, to Lake Michigan. The United States wished to take over artificial waterways owned by the State of Illinois. The United States Attorney General rendered the opinion that no permission from Illinois was necessary for federal regulation and control of those portions of the waterway which were originally navigable streams, which the State had merely improved. However, as to those portions of the waterway which were entirely artificial, he concluded that Congress could provide for improvement and control of navigation, but that the State could not be

deprived without its consent of reasonable compensation for the use of its property. 36 Op. U.S. Att'y Gen. 203 (1930). In the words of the opinion:

> Some parts of this system appear to be wholly artificial, constructed with State funds, and as to them the question arises whether the United States may take over complete possession and control of an artificial highway constructed by a State, and appropriate the State's investment without the payment to it of any compensation or consideration. It has been shown that notwithstanding a waterway is artificial and built by a State, commerce and navigation on it are subject to Federal regulation and control, and it is subject to the maritime and admiralty jurisdiction of the United States. *The authorities have not gone to the extent of holding that complete possession and control of such artificial waterways may be taken over from a State and the State deprived of its investment and of any return thereon without its consent.* It may be that Illinois, as owner of the canal property built in part with State funds, could charge reasonable tolls to vessels passing through them. In such case, no doubt, Congress could regulate the charges. (See 33 Op. 428.) It is not apparent that the State is in any worse position than a public-service corporation which builds an artificial waterway under a State charter. *Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within the admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner, and deprive the latter of his investment or any return upon it.*

> While this question is a novel one, I find nothing in the decisions of the courts to warrant the conclusion that powers of the Federal Government over artificial waterways extend that far.

Id. at 213-14 (emphasis added). The conclusion of the Attorney General in the foregoing opinion is perfectly consistent with a properly limited navigation servitude.

The Ninth Circuit's failure to cite any authority for the decree that regulatory authority and right to mandate public access exists inseparably is telling. The edict fails to withstand logical scrutiny because the existence of contrary Supreme Court decisions and Acts of Congress is ignored. This approach misses an opportunity to refine the scope of regulatory authority over waters in circumstances which demand it.

The effect of this decision reaches far beyond one isolated Hawaiian fish pond. In effect, the Ninth Circuit has given the Corps of Engineers carte blanche to establish public recreational water bodies where formerly a privately controlled residential marina-style environment existed. Without fanfare, and subsequent to significant improvement making Kuapa Pond more desirable, the Corps decided that revised 1972 regulations permitted them to exercise prerogatives over its waters, including transforming it to a public recreation area. It was not so designed and never so intended. Reposing such power in the Corps of Engineers or any other body, raises serious questions about future private property status in this country. Federal regulation and the right to public access can and must be separated if private property rights are to be respected.

3. Prohibiting Kaiser Aetna from maintaining controlled access to and monitoring activities in Kuapa Pond,

constitutes a taking of private property without compensation contrary to the fifth amendment to the Constitution.

According to ancient Hawaiian property law, Acts of Congress, decisions of this Court, and decisions of the Supreme Court of Hawaii, Kuapa Pond's ownership has been regarded as private property until the Ninth Circuit determined otherwise. The Ninth Circuit decision mandating public access is a poorly disguised confiscation of property, absent the employment of appropriate eminent domain procedures. Petitioner submits that this decision goes far beyond any regulation arguably within the powers of the Corps of Engineers. The taking of private property for public use cannot rightfully be termed a regulation within the proper scope of the Corps' powers under the Rivers and Harbors Act. Zoning regulations, frequently upheld regardless of the degree of restrictiveness, never extend as far as this decision; they may restrict a property owner's use, but they do not force that owner to let everyone else use his land at no cost to them or the government.

Kaiser Aetna and those authorized to use Kuapa Pond are being required to bear an unreasonable and unconscionable proportion of the expense for maintaining what the injunction will transform into a public recreational facility. Private parties, including petitioners, have paid the development costs of Kuapa Pond. Funds generated from marina lot lessees, certain other parties authorized by the fee owner and petitioner to use Kuapa Pond, and Kaiser Aetna continue to be the only source of payment for costs incurred in maintaining the waterways. Maintenance dredging and the removal of floating debris are consistently required. The long-range, comprehensive plan for development of the Kuapa Pond area was based upon control by petitioners of access to the pond and making agreements

with third parties for funding the continued maintenance of the waterways.

Kuapa Pond requires maintenance in order to keep the waterways open, safe and free from obstruction and debris. The Corps of Engineers has acknowledged that it has no funds available to provide this service nor any plans to seek or allocate funds in the foreseeable future. The only alternative is for the private parties to continue their contractual obligations to maintain an area which no longer has controlled access, but is a public playground. Save for the Ninth Circuit, the petitioners are unaware of any court decision, which, in effect, holds that:

> (a) Federal regulation of activities within a private pond or marina necessarily imposes a public navigation servitude; *and*
>
> (b) The private owners and their authorized users must subsidize public use if the pond or marina is to be properly maintained.

United States v. *Appalachian Electric Power Co., supra; The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1870); *United States* v. *Stoeco Homes, Inc.,* 359 F. Supp. 672 (D.N.J. 1973), *aff'd,* 498 F.2d 597 (3rd Cir. 1974), *cert. denied,* 420 U.S. 927 (1975); and *Weiszmann* v. *Dist. Eng., U.S. Army Corps of Eng.,* 526 F.2d 1302 (5th Cir. 1976); cited by the Ninth Circuit, do not so hold.

The decision of the Ninth Circuit violates due process in that the injunctive relief granted results in a confiscation of private property without compensation. It is no answer for the Ninth Circuit to say that since the petitioners caused the waters of the pond to be navigable that they thereby assumed, albeit unwittingly, the burden of

public access. Such a simplistic answer ignores (1) settled Hawaiian law of ancient origin, (2) fundamental federal principles respecting property rights vested upon territorial annexation, (3) the separability of the concepts of public access and regulation, (4) practical economic hardships caused by requisite ongoing maintenance, and (5) the fifth amendment prohibition against taking private property for public use without just compensation. The decision serves to create a public water playground at the financial, environmental and aesthetic expense of the marina lot lessees and petitioners.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richard Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
HAMILTON, GIBSON, NICKELSEN,
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

Appendices

APPENDIX A

Opinion of the Ninth Circuit Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2400

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—VS.—

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Defendants-Appellees.

No. 76-1968

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—VS.—

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Defendants-Appellants.

Opinion

On Appeal from the United States District Court for the District of Hawaii

Before:

Merrill, Cummings,* and Sneed,

Circuit Judges.

Merrill, *Circuit Judge*:

Cross-appeals have been taken from judgment of the district court. The United States, as plaintiff, has secured a declaratory judgment establishing that the waters of Kuapa Pond on the Island of Oahu, Hawaii, are navigable waters of the United States, and that under §10 of the Rivers and Harbors Act, 33 U.S.C. §403 (1970),[1] the owner and the lessee of underlying and surrounding lands must obtain authorization from the Army Corps of Engineers for any future construction, excavation or filling affecting the pond. The owner and the lessee of the underlying and surrounding land have taken an appeal from that judgment. The United States also sought to establish that public access must be accorded to the pond as navigable water of the United States. An injunction was sought to prevent the owner and lessee from denying public access and to require them to notify the public of the fact of the pond's accessibility. The district court ruled against the United States on this claim and the government has appealed from that judgment. The decision of the district court appears ta 408 F.Supp. 42 (D. Hawaii 1976), and contains an excel-

* Honorable Walter J. Cummings, United States Circuit Judge of the Seventh Circuit Court of Appeals, sitting by designation.

[1] Section 403 in general makes it unlawful, in absence of approval of the Army Corps of Engineers, to create an obstruction to the navigational capacity of any of the waters of the United States, build structures in such waters or excavate or fill so as to alter or modify the course or capacity of such waters.

lent discussion of Hawaiian history as it bears on the nature of water bodies such as Kuapa Pond.

The pond is contiguous to Maunalua Bay, which is without question navigable water of the United States. Until 1961, the pond was a fishpond and its waters were used exclusively for the taking of fish. It covers 523 acres and extends inland from Maunalua Bay a distance of approximately two miles. The nature of such ponds was recently discussed by the Hawaii Supreme Court in *In re Keohokalani Kamakana*, —— Hawaii ——, —— P.2d —— (1978). In footnote 2 the court states:

> "Fishponds, both along the shore and inland, were part of a complex aquaculture system developed in pre-historic Hawaii. Although fishponds existed elsewhere in Polynesia, in Hawaii they were widespread and included numerous man-made and natural enclosures of water in which fish and other products were raised and harvested. Hawaiian aquaculture's distinctive feature was the sluice grate with its associated sluice. This grate was stationary, with no moveable parts, and allowed the Hawaiians to progress from tide-dependent fishtraps to artificial fishponds which could be controlled at all times of the tide. *See generally*, R. Apple and W. Kikuchi, *Ancient Hawaiian Shore Fishponds: An Evaluation of Survivors for Historical Preservation* (1975); M. Kelly, *Loko I'a O He'eia* (Bishop Museum, 1975).
>
> Kanoa fishpond is classified as a *loko kuapa*, a fishpond of littoral water whose side or sides facing the sea consist of a stone or coral wall usually containing one or more sluice grates."

Kuapa Pond's private ownership dates from the Great Mahele or royal land division of 1848. By that division

large land units, known as "ahupuaa," extending from the volcanic mountains of the interior (which are characteristic of each island) outwardly to the sea were granted by King Kamehameha III to his chiefs. Kuapa Pond was part of an ahupuaa that eventually vested in Bernice Pauahi Bishop and on her death formed a part of the trust corpus of the Bishop Estate, the present owner. As was the case with Kanoa Fishpond in *In re Kamakana,* Kuapa Pond, from time immemorial, was separated from the bay by a sandbar and coral wall, with sluice grates permitting the pond to enjoy the enriching effects of tidal action but with no navigable access to Maunalua Bay. During the early 1900's a roadway was built along the sandbar and reinforced with coral, and bridges were built over the sluice grates.

In 1961, the Bishop Estate leased a 6,000-acre area to Kaiser Aetna for subdivision purposes, and the subdivision known as "Hawaii-Kai" resulted. Kuapa Pond was included in the lease. Under the agreement Kaiser Aetna dredged and filled parts of the pond. Accommodations for pleasure boats were created. The sluice grates were eliminated and the bridges were elevated to allow clearance of 13½ feet over mean water level. Below the bridges a channel was dredged to a depth of 8 feet. The average depth of the pond itself was increased from the fishpond depth of 2 feet to a depth of 6 feet. The pond, so improved, is now known as "Hawaii-Kai Marina." There were, at the time of trial, approximately 1500 marina waterfront lot lessees, all of whom for a fee could procure marina privileges, including pleasure boat use of the pond and access to and from the bay. In addition, some 56 nonresident boat owners for a fee were permitted to moor their boats in the marina and enjoy marina privileges.

Kaiser Aetna controlled access to and use of the marina. Commercial use was not permitted, except for a small vessel, the Marina Queen, which could carry 25 passengers and was used for about 5 years for the purpose of promoting sales of marina lots and for a brief period was used by marina shopping center merchants for promotional purposes.

Appeal of Kaiser Aetna and Bishop Estate

Kaiser Aetna and Bishop Estate challenge the district court's holding that Kuapa Pond was navigable water of the United States. There can be little question but that Hawaii-Kai Marina has been rendered navigable by the improvements made by Kaiser Aetna.[2] Over 600 boats enjoy its mooring and fueling facilities, and regularly use the marina as a waterway to Maunalua Bay and the Pacific Ocean. Kaiser Aetna contends, however, that since the waters were privately owned and have never been used in interstate commerce, the marina cannot be held to be navigable water of the United States.

The source of the government's authority over waters was noted in *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 404-05 (1940), where the Court stated:

> "The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power . . . To regulate Commerce . . . among the several States.' It was held early in our history that the power to regulate commerce nec-

[2] We accept, arguendo, the contention of Kaiser Aetna that Kuapa Pond in its natural state was not navigable; that although it was subject to the ebb and flow of the tide, that test determines the outer limits of an admittedly navigable water body and does not serve to render navigable a separate and distinct water body not otherwise navigable.

essarily included power over navigation. To make its control effective the Congress may keep the 'navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets."

And, later:

"We are dealing here with the sovereign powers of the Union, the Nation's right that its waterways be utilized for the interests of the commerce of the whole country."

Id. (footnotes omitted).

The term "navigable water of the United States" was defined in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870), where the Court held:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

Elaborating on this definition, the Court in *United States* v. *Appalachian Power Co., supra,* held that "it is proper

to consider the feasibility of interstate use after reasonable improvements which might be made" in determining whether a water is navigable, 311 U.S. at 409. Thus, the factual inquiry is whether the water "has 'capability of use by the public for the purposes of transportation or commerce'." 311 U.S. at 410. The feasibility of use in interstate commerce can be demonstrated by the existing use of the waterway by private boats for personal use, as the Court stated:

"Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."

311 U.S. at 416.

To the same effect is *Weiszmann* v. *Dist. Eng., U.S. Army Corps of Eng.,* 526 F.2d 1302, 1305 (5th Cir. 1976), where the court held:

"There is no requirement that a body of water sustain actual commerce in order to meet the test of navigability. Rather, the mere capability of commercial use of a body of water suffices, even if such commerce could be made possible with artificial aids." (citations omitted).

Kaiser Aetna contends, however, that despite the marina being navigable in fact and demonstrably suitable for commercial use, regulations of the Army Corps of Engineers preclude its being held to be navigable water of the United States. 33 C.F.R. §209.260(g) reads as follows:

"(g) *Improved or natural condition of the water body.* Determinations are not limited to the natural or original condition of the water body. Navigability

may also be found where artificial aids have been or may be used to make the water body suitable for use in navigation.

(1) *Existing improvements: Artificial water bodies.* (i) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above; that is, whether the water body is capable of use for purposes of interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce • • • ."

Kaiser Aetna reasons from this language that since Kuapa Pond was not navigable in its natural state but was artificially rendered navigable, and since it is open to navigable waters of the United States at one end only and does not, in fact, support commerce, under the regulation it does not constitute navigable water of the United States.

The government responds: "The short answer is that this portion of the regulations has absolutely no bearing here because Kuapa Pond is not an 'artificial water body.' It is artificially *improved* but not artificially *created*." [3] We do not find this construction unreasonable and have been cited to no authority construing the regulations otherwise.[4]

[3] Brief of the United States as cross-appellee, pages 14-15.

[4] The government claims support from *United States* v. *Sexton Cove Estates Inc.*, 526 F.2d 1293, 1299, n.14 (5th Cir. 1976).

On its face, if its purpose is to limit jurisdiction of the Corps, the regulation is not clear. It states at one point: "The test is generally as stated above, that is whether the water body is capable of use for purposes of interstate commerce." This would appear to cover the marina. The portions of the regulation on which Kaiser Aetna relies deal with canals and apply here only by analogy. To apply those portions here would be to hold that the government voluntarily has surrendered jurisdiction of the Corps with respect to improved natural water bodies in all cases save those where the water body in fact supports interstate commerce, and this despite the government's protest against such construction of its regulation and despite the generous provisions of the Rivers and Harbors Act as construed by the Supreme Court. Under the circumstances we shall not hold the Corps to such a construction of its regulations.

For the reasons set forth by the district court in its opinion, *supra*, 408 F.Supp. at 54-55, we agree that the Corps' acquiescence in Kaiser Aetna's improvements cannot result in the government being held estopped to contend that the marina is navigable water of the United States.

We conclude that under *The Daniel Ball, supra,* and *Appalachian Power Co., supra,* the Hawaii-Kai Marina was navigable water of the United States and within the regulatory control of the United States under the Rivers and Harbors Act.

Appeal of the United States

It has been emphasized by Kaiser Aetna throughout these proceedings that under Hawaii property law the fishpond as a fishpond—the submerged land together with the

waters of the pond—constitutes a unit of property unlike any known to the continental United States; that it has the property characteristics of fast land and is not subject to a navigational servitude.

The district court agreed. While holding that Kuapa Pond was navigable water of the United States, it ruled that the pond "was never servient to any 'navigation servitude;' it was always the legal equivalent of fast land for property and 'navigation' purposes. Therefore, its owners had the right to exclude the public therefrom * * *." 408 F.Supp. at 52.

The court concluded:

> "[W]hile Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof."

408 F.Supp. at 54.

In this we hold that the court was in error.

We note first that Kuapa Pond lost its fishpond characteristics and ceased to exist as a fishpond when it was transformed into a marina. Even fast land appurtenant to a waterway can by excavation be submerged and rendered a part of the waterway and should this occur the land loses its character as fast land and takes on the character of submerged land. *Weiszmann* v. *Dist. Eng. U.S. Army Corps of Eng., supra,* 526 F.2d 1302, 1305 (5th Cir. 1976); *United States* v. *Stoeco Homes, Inc.,* 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975). Thus, even if the pond as such is considered to be the "legal

equivalent of fast land" under state law, when it was converted into a marina and was made navigable in fact it took on the character of a waterway.

Further, we disagree with the manner in which the district court has resolved the problems presented by the conflict between federal and local law respecting property rights and servitudes.

In the first place, in our judgment, federal regulatory authority over navigable waters (which the district court recognized to exist) and the right of public use cannot consistently be separated. It is the public right of navigational use that renders regulatory control necessary in the public interest.

Secondly, the federal navigational servitude and the public right of use are not imposed or appropriated by action of the government in the nature of seizure. They exist as characteristics of all navigable waters of the United States. *United States* v. *Rands,* 389 U.S. 121, 122-23 (1967); *United States* v. *Chicago, M., St.P. & P. R.R.,* 312 U.S. 592, 595-97 (1941). Land underlying navigable water differs from fast land in its servient characteristics which result from the dominant property characteristics of the navigable water by which it is submerged. If fast land is to be subjected to public use for transportation, it must voluntarily be dedicated to the public by the owner, or must be acquired by the public with due compensation to the owner. But land underlying navigable water underlies an existing public roadway. By virtue of the water's presence it is burdened with a public servitude. If the water body is interstate or forms part of an interstate waterway the navigational servitude runs to the federal government.

Hawaii property law at most relates to any servitude the state may claim. If the state chooses to relieve land under-

lying fishponds such as Kuapa Pond from any navigational servitude otherwise owing to the state (even after the pond's transformation into a marina), that is the state's business. The effect of Hawaii law on state rights, however, is not before us. No matter what those rights may be they can have no effect on the federal interest in interstate commerce nor the rights and obligations of the federal government in this respect under the Constitution. When the waters of the pond became navigable waters of the United States, the federal navigational servitude attached.

On the appeal of Kaiser Aetna and the Bishop Estate, judgment of the district court is affirmed. On the appeal of the United States, judgment is reversed and the matter is remanded for entry of judgment in favor of the United States.

APPENDIX B

Opinion of the United States District Court for the District of Hawaii

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,
Plaintiff,

—VS.—

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of the Bernice P. Bishop Estate; KAISER HAWAII-KAI DEVELOPMENT CO.,
Defendants.

DECISION

The United States, for its Corps of Engineers, asks for a declaratory judgment and injunctive relief, seeking a declaration that the waters of Kuapa Pond, now more generally known as Hawaii-Kai Marina, are navigable waters of the United States, and that defendants must obtain authorization from the Corps for any future construction, excavation or filling in the marina, in accordance with § 10 of the Rivers and Harbors Act, 33 U.S.C.A. § 403 (1970). Plaintiff also requests that this court enjoin the defendants from interfering in any way with public access to the waters of the marina as well as mandate defendants to publicize that fact.

Hawaii-Kai Marina is situated wholely on property owned in fee simple by defendant Bishop Estate. In 1967 the Estate leased the property within which was Kuapa Pond to Kaiser-Aetna interests, which began dredging and filling the pond in order to create the present marina, now a part of a larger and surrounding development known as Hawaii-Kai.

Plaintiff asserts that the marina is navigable water of the United States under two alternative theories: Kuapa Pond was navigable in its natural state and did not lose that status by dint of the subsequent development, or the subsequent development by defendants rendered the pond navigable. The Corps informed Kaiser-Aetna in 1972 that it considered the pond to be navigable water, whereupon the defendants applied for § 10 permits without admitting the navigability of Kuapa Pond.

Defendants deny that the pond is a navigable water of the United States and also raise several affirmative defenses: First, prior to 1972 the Corps did not require permits because it considered the waters to be private, thereby creating a form of estoppel to this action; second, a governmental declaration that the waters of the marina are public navigable waters of the United States is a taking of private property for public use without just compensation, in violation of the Fifth Amendment; third, since the quality of the marina waters will be harmed by public use, the administrative determination that the waters are navigable is a major federal action significantly affecting the human environment, for which the Corps has failed to file an environmental impact statement under 42 U.S.C.A. § 4332(2)(c) (1973).

Due to the potential impact of the resolution of the legal issues of this case upon numerous other fishpond properties in Hawaii,[1] the court invited parties with interests in other ponds to appear as *amici curiae*. The case was tried without a jury upon stipulations by the parties, submission of exhibits, and testimony of witnesses.

[1] Kuapa Pond was used as a fishpond prior to development, as more fully set forth later in the decision. The Corps of Engineers compiled a list of 142 fishponds throughout the state.

Findings of Fact

I. *The pre-development fishpond*

Kuapa Pond covered 523 acres and extended approximately 2 miles inland from Maunalua Bay and the Pacific Ocean on the island of Oahu, Hawaii. The pond was contiguous to Maunalua Bay, the latter being navigable water of the United States.

A not uncommon barrier beach delineated Kuapa Pond from the bay. The area probably was a stream mouth prior to the end of the ice age, at which time the rise in sea level caused the shoreline to retreat from a position that is now submerged by Maunalua Bay, and is marked by the reef edge. Partial erosion of the headlands adjacent to the bay formed sediment which accreted to form the barrier beach at the mouth of the pond, creating a lagoon.

Early Hawaiians used that lagoon as a fishpond and reinforced the natural sand bar with stone walls where the tidal flows in and out of the ancient lagoon occurred. Approximately two-thirds of the pond's water came from the sea. Runoff waters from the surrounding mountains provided the balance. Part of the seawater present in the pond percolated through the barrier beach. As indicated above, for the area's use as a fishpond the barrier was incomplete in its normal state. Wave and tidal action from the sea and occasional heavy fresh water flow breached the sand barrier and allowed the ocean tides to flood the pond.

Recorded history prior to annexation of Hawaii and geological evidence indicate two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these open-

ings. During high tide, water from the bay and ocean entered the pond through the gates. During low tide, the current flow reversed toward the ocean.

The Hawaiians utilized the tidal action in the pond to raise and catch fish, primarily mullet.[2] During ebb tides, the sluice gates allowed water but not large fish to escape, thus "flushing" and enriching the pond while preserving the crop. Water depths in the pond varied up to 2 feet at high tide. Large areas of land at the inland end were completely exposed at low tide. The fishermen harvested the pond with the aid of shallow-draft canoes or boats, but the barrier beach and stone walls prevented boat travel directly therefrom to the open bay.

Kuapa Pond, with other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Most fishponds were built behind barrier beaches, such as Kuapa Pond, or immediately seaward of the land controlled by the *alii,* or chiefs.[3] By imposing a tabu on the taking of the fish from a pond, the chief alone determined the allotment, if any, of fish, just as he distributed the other crops among his sub-chiefs, land agents, and vassals. The fishpond was thus an integral part of the Hawaiian feudal system. Chiefs gave land, including its fishponds, to sub-chiefs, or took it away at will. Any fishponds in conquered chiefdoms became the personal property of the conquering high chief and were treated in

[2] Although some small fry entered the pond with the tidal flux, Hawaiian aquaculture depended upon seeding the pond with fry caught in nearby bays, because mullet spawns only in seawater, not in the brackish water of the pond.

[3] A *loko kuapa* is a fishpond of littoral water created by construction of a stone wall across a side or sides facing and having access to the sea. When what is primarily a barrier-beach type pond needs a stone wall to separate the pond from sea action it is referred to as a loko kuapa. Such was Kuapa Pond.

the same manner the high chief treated all newly subjugated lands and appurtenances. The commoner had no absolute right to fish in the ponds, nor in the sector of ocean adjacent to the chief's land—all such rights were vested in the chiefs and ultimately in the king, alone.

In 1848, King Kamehameha III pronounced the Great Mahele, or national land distribution. Any fishponds therein were allotted as part or inholding of the *ahupuaa* (a land/water unit). Titles to fishponds were recognized to the same extent and in the same manner as rights were recognized in fast land. Kuapa Pond was within the land of a Royal Patent, pursuant to the Great Mahele, with title eventually vesting in Bernice Pauahi Bishop and thence in defendant Bishop Estate.

During the early 1900's, Kalanianaole Highway was constructed upon and along the sand bar which separated Kuapa Pond from Maunalua Bay and the Pacific Ocean. Coral fill was placed on top of the sand bar to provide a foundation for the highway. Highway bridges were made over the waterways between the two sluice gates of Kuapa Pond and the bay. Always, until 1961, Kuapa Pond was solely used as a fishpond.

As indicated above, at all times the pond area was subject to the ebb and flow of the tides, excepting only any restraints created by the sluice gates.

II. *Post-development characteristics*

In 1961 the Bishop Estate gave Kaiser-Aetna interests master subdivision housing-development rights to a 6,000 acre area known today as Hawaii-Kai. The lease included the Kuapa Pond area, and the agreement contemplated that Kaiser-Aetna would dredge and fill parts of the pond, erect retaining walls, and build bridges within the development to create what is now the Hawaii-Kai Marina. Upon notice

to the Corps of Engineers, defendants were told that no permits were needed for their proposed developments and operations within Kuapa Pond.

Later, Kaiser-Aetna notified the Corps that it planned to improve the Kalanianaole Highway bridge to a maximum clearance of 13.5 feet over mean sea level, and dredge a channel below it to a depth of 8 feet, to allow boats from the marina to enter into and return from the bay, as well as to provide better drainage of the marina waters. The Corps acquiesced in the developers' proposals,[4] its chief of construction commenting only that the "deepening of the channel may cause erosion of the beach."[5]

Construction of the Hawaii-Kai subdivision and marina proceeded as planned and there are now approximately 22,000 residents therein. The average depth of the marina is now 6 feet, with a main channel of 8 feet. Since development of the marina, 668 boats have been registered and authorized to use the pond. Kaiser-Aetna oversees the operations of the marina and has generally excluded all "commercial" vessels, although it has not yet decided whether or no [*sic*] businesses in the shopping center that abuts the marina may operate commercial vessels.

Kaiser-Aetna owns and operates a small vessel within the marina, the "Marina Queen", which can carry up to 25 persons. During 1967-72, Kaiser-Aetna operated the Marina Queen primarily to show Hawaii-Kai to possible subdevelopers and purchasers of homes or homesites. On Sundays, they invited the general public to join the cruises.

[4] The record indicates no response to a letter from D. M. Snow, Project Engineer for Kaiser-Aetna, to the Corps of Engineers (Defendants' Exhibit 15) which stated: "It is our understanding that no separate federal permit will be required for this construction, and that there will be no requirement for public use or control of any waters on the Kuapa Pond side of the bridge."

[5] Defendants' Exhibit 14.

During 1973, the marina shopping center merchants' association took over operation of the Marina Queen. The ship ran six or seven times a day for the purpose of attracting people to the marina shoreside and adjoining shopping facilities. As a part of the general promotion, Kaiser-Aetna chartered buses to pick up tourists at various points in Waikiki and transport them to the marina area. The tourists were given a special package of shop discounts and a ride on the Marina Queen, for which they paid $1 and later $2 per person for the package. During this period, 18,254 tourists and a total of 38,821 persons rode the Marina Queen. The boat ride was available without charge to anyone who came to the marina.

The promotion ended in early 1974, and Kaiser-Aetna now uses the Marina Queen for promotion of real estate sales and for school groups on request. The Marina Queen has operated at all times solely within the waters of the marina.

Every marina-lot lessee has a non-exclusive easement with the trustees of Bishop Estate, which still owns the fee, for purposes of navigation across Kuapa Pond and access to Maunalua Bay. Approximately 1,500 lots front the marina, and their lessees pay $72 annually for maintenance of the pond.[6] In addition, at least 86 Hawaii-Kai but non-marina lot lessees pay $72 annually for boating privileges of the marina, and 56 boat owners who are not residents of the Hawaii-Kai subdivision pay the same fee for the right to moor their boats in the marina and travel across it into Maunalua Bay.[7]

[6] Natural accretion tends to block up the artificial channels. Development dredging ended in 1970. During 1972-73 the first maintenance dredging took place at a cost of $160,000 to the defendants.

[7] Subsequent to the trial, the court requested that defendants provide information about the use of the marina by nonresidents. They submitted it in the form of a post-trial stipulation of facts,

Since the channel connecting the marina and the bay is unobstructed, the marina waters are subject to the ebb and flow of the tides.

Conclusions of Law

I. *Introduction*

The concept of "navigable waters" grew out of the "public common of piscary," *i.e.*, the right of the common people of England to travel upon the waters and to fish them. Under English common law, the crown owned the beds of all navigable waters affected by the ebb and flow of the tide. *Martin* v. *Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 411-13 (1842). When the American Revolution took place, the states succeeded to all rights and powers of the Crown. Thus they held title to the beds and control over public use of all navigable waters within their respective boundaries.

Upon ratification of the Constitution, jurisdiction over the surface of navigable waters used in interstate commerce passed to the federal government under the Commerce Clause. Jurisdiction over the surface of navigable waters lying wholly within a single state, and not connecting with other waters to form a navigable highway of interstate commerce, remained with the situs state. *Id.* at 410.

Subject to exceptions to be discussed below, the same federal-state rights of jurisdiction and title generally applies to states admitted to the Union after the original 13,

---

into which plaintiff refused to enter. The court accepts the declaration of defendants as the Court's Exhibit 1 over plaintiff's objection, as an admission against interest of fact.

The proposed post-trial stipulation also indicates that 86 non-marina lot lessees are using the pond rather than 175. While the government did not agree to the stipulation, the court will accept the "86" figure as a minimum number.

the underlying theory being that the United States acquired lands and held them in trust for future states so that they could be admitted on an equal footing with the original states. *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845).

The term "navigability" has many legally distinct applications. (1) It may determine *title* to river and lake beds.[8] (2) It has been the touchstone of Congressional *jurisdiction* over waters via the Commerce Clause.[9] (3) It embodies the *navigation servitude*, a modern declaration of the common law right of public access to the surface of waters. In addition, (4) admiralty jurisdiction in federal courts flows from the general concept of navigability.[10] The use of the term "navigability" for these four purposes, however, does not necessarily mean that each is co-extensive with the other. *See United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940). Therefore any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of "navigability" was invoked in a particular case. In this suit, plaintiff is seeking a determination that the Hawaii-Kai Marina is within Congressional jurisdiction as exercised and implemented by the Rivers and Harbors Act, and that the waters of the marina are subject to the navigation servitude.

---

[8] *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596 (1941); *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865). *Utah* v. *United States*, 403 U. S. 9 (1971).

[9] *Arizona* v. *California*, 283 U.S. 423, 454-57 (1931) (the navigation power sustains Congressional authorization of the Hoover Dam); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940) (federal power to license private hydroelectric projects); *United States* v. *Grand River Dam Auth.*, 363 U.S. 229 (1960) (approving federal flood control project on nonnavigable tributary because it is related to flood control on navigable streams).

[10] *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

II. *Navigability of Kuapa Pond in its natural state*

If Kuapa Pond was navigable water of the United States prior to its development by defendants, such development would not have destroyed that status, absent a specific Congressional abandonment of the waters, and the marina would, unquestionably, be subject to the public's right of access. *See Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 124 (1921).

A. *Tests of navigability*

Of the several tests of navigability for purposes of public access to surface waters in the United States, the most common one had its genesis in cases dealing with admiralty jurisdiction and the Commerce Clause power.[11] The pronunciamento in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), while not involving seawaters, is generally applied: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact." Anent that statement, one expert has observed that "a navigable river is any river with enough water in it to float a Supreme Court opinion."[12] Although Kuapa Pond floated shallow-draft boats for fishing purposes, one crucial element of the government's case was certainly missing prior to the transformation of the pond into the Hawaii-Kai Marina, viz., navigation in *interstate* commerce.[13]

[11] *Propeller Genessee Chief, supra*, n. 10; *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

[12] C. Meyers & A. Tarlock, Water Resource Management 240 (1971).

[13] "And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball, supra* n. 11 at 563.

There is no evidence that the barrier beach and the pond's stone walls ever admitted the possibility of even the shallowest boats floating directly from Kuapa Pond to the open bay.

The government, however, maintains that the principle established in *United States* v. *Appalachian Electric Power Co., supra,* applies here, viz., that a waterway must also be considered to be navigable in law if reasonable improvement would render it navigable in fact.[14] Thus, an inquiry under *Appalachian* must focus on Kuapa Pond in its natural state and entail a comparison of the cost of improvement with need.[15] However, the government has presented no evidence on the subject, other than that the marina may now be or may be made susceptible to interstate commerce.[16] The mere fact that the defendants decided that it was reasonable for them to spend the money necessary to develop Kuapa Pond into a marina as a recreational body of water *adjunct* to its private residential subdivision, for the apparent purpose of enhancing the property value of homesites thereon and about, does not

[14] The law of *Appalachian* does not necessarily help the plaintiff with respect to its navigation servitude claim because that case dealt only with Congressional power to assert its Commerce Clause jurisdiction for purposes of licensing private power plants. See 311 U.S. at 407-08.

[15] As observed in *Appalachian, supra,* at 407-08: "[T]here are obvious limits to [the cost of] such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful." *See also United States* v. *Rio Grande Irrigation Co.*, 9 N.M. 292, 299, and 174 U.S. 690, 699 (1899).

[16] The government presented evidence, rebutted by defendants, that *further* reasonable improvements of the marina would render it susceptible to additional forms of commerce. *Appalachian* is not directly in point on any such separate second stage of improvements. To have the *Appalachian* doctrine apply, the first stage and second stage together would have to be found economically reasonable at the inception of the project.

lead, per se, to the conclusion that it was ever financially reasonable to develop Kuapa Pond into a highway just for interstate commerce by water.

A third test of natural-state navigability has been applied in several federal courts in recent years,[17] viz., the "ebb and flow" test. Under this test, expressly adopted by the Third Circuit in *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 605-06, 610 (1974), estuarine tidal areas which are regularly inundated by the mean higher, high tide[18] are subject to the federal navigation servitude.

As indicated above, unquestionably the Pacific tides ebbed and flowed over Kuapa Pond in its pre-marina state. Maps and surveys, as well as the bases of fishpond aquaculture, establish that there would have been at least a minimum basis for federal jurisdiction if the ebb and flow test could be applied, because some of Kuapa Pond was *always* inundated.[19] Therefore, if it were not for the unique legal status of Hawaiian fishponds such as Kuapa Pond as strictly private property, free and clear of any claim by the Crown either to the beds thereof or the waters

[17] *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 605-06, 610 (3d Cir. 1974); *United States* v. *Cannon*, 363 F.Supp. 1045 (D. Del. 1973); *United States* v. *Lewis*, 355 F.Supp. 1132 (S.D. Ga. 1973); *United States* v. *Baker*, 2 E.R.C. 1849 (S.D.N.Y. 1971); *cf. Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied* 401 U.S. 910 (1971); *Tatum* v. *Blackstock*, 319 F.2d 397 (5th Cir. 1963); *United States* v. *Joseph G. Moretti, Inc.*, 331 F.Supp. 151, 156-57 (S.D. Fla. 1971). *But see Pitship Duck Club* v. *Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *North Am. Dredging Co.* v. *Mintzer*, 245 F. 297 (9th Cir. 1917).

[18] On the Pacific coast, the line of the mean higher, high tide is used instead of the mean high tide. *See United States* v. *California*, 381 U.S. 139, 175-76 (1965), *modified*, 382 U.S. 448, 449-52 (1966).

[19] Although plaintiff did not present evidence to establish the reach of the mean higher, high tide, areas that were historically always covered by water *a fortiori* are within the mean higher, high tide.

thereon under Hawaiian law prior to annexation, and their protection then and thereafter as such by statute and Constitution, application of the ebb and flow test would have established a public right of access to Kuapa Pond.[20]

B. *The effect of Hawaiian property law*

As indicated above, the status of fishponds from Hawaiian prerecorded history up through the Great Mahele of 1852 was clearly that of private property, appropriated by successive conquerors, and given by and to chiefs, with the commoners excluded from the lands, the pond waters and the fish therein, under every regime. The distribution of land in the Great Mahele made no change in the rights of private ownership of fishponds, as the Hawaii Supreme Court recognized in a series of pre-annexation cases.[21]

The Organic Act of 1900, following annexation, repealed all prior laws conferring private rights in *seawater* fisheries (subject to vested rights) but specifically exempted

[20] It cannot be doubted that where the federal government has a navigation servitude it also has jurisdiction for Commerce Clause purposes. *See* section III.A *infra*.

[21] *Haalelea* v. *Montgomery*, 2 Haw. 62 (1858); *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879); *Kapea* v. *Moehonua*, 6 Haw. 49 (1871); *Harris* v. *Carter*, 6 Haw. 195 (1877). Private ownership was so commonly accepted under the Monarchy that the issue was not raised directly in these cases. Dictum, under these facts, enhances rather than detracts from the strength of the legal precedents.

The Board of Commissioners to Quiet Titles was concerned solely with landed property, *see Carter* v. *Hawaii*, 200 U.S. 255, 257 (1906), and routinely included fishponds within its land awards or patents under the Great Mahele. In those awards or patents of land wherewith a fishpond was appurtenant, either the description or accompanying map or both showed the fishpond as part of the award. Haw. Att'y Gen. Op. No. 1689, at 460 (1939). For example, Kuapa Pond was not described separately but was included within the boundaries of the Royal Patent of the Land of Maunalua certified by the Oahu Commissioner of Boundaries, June 13, 1884.

fishponds from its scope.[22] A similar provision appears in the Hawaii Constitution, article X, § 3. Opinions since annexation and statehood confirm the private nature of fishponds in Hawaii.[23]

The United States Supreme Court has recognized the legitimacy of similar Hawaiian property rights in sea fisheries. *See Damon* v. *Hawaii,* 194 U.S. 154 (1904); *Carter* v. *Hawaii,* 200 U.S. 255 (1906). Justice Holmes delivered both opinions; in *Damon* the learned jurist wrote:

> A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.

194 U.S. at 158. While, as indicated, these cases dealt with sea fisheries and not fishponds, they constitute a federal

[22] "All fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States . . . ." 48 U.S.C.A. § 506 (1952).

[23] *Murphy* v. *Hitchcock,* 22 Haw. 665, 669-70 (1915); *State* v. *Hawaiian Dredging Co.,* 48 Haw. 152 (1964); *Palama* v. *Sheehan,* 50 Haw. 298 (1968); Haw. Att'y Gen. Op. No. 1689 (1939); Haw. Att'y Gen. Op. No. 57-159 (1957).

McBryde Sugar Co. v. *Robinson,* 54 Haw. 174, 187 (1973) (and now before this court) holding that "ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good," does not apply to claims of ownership to fishponds such as Kuapa Pond.

recognition of peculiar rights arising out of Hawaii's unique feudal system of property rights.

The theory that the federal government holds a stewardship over all navigable water in a United States territory prior to its being admitted to statehood (see section I *supra*), may be valid for lands obtained from a foreign government where there is no history of legally authorized private proprietorship over certain waters therein. Where, just as here under the Hawaiian Kingdom, property rights have been established by a government prior to purchase or annexation of the lands however, those private property rights survive if they are recognized in and by the instrument of annexation. For example, in *Knight* v. *United States Land Association,* 142 U.S. 161, 183-84 (1891), the federal government confirmed a title to tidelands which rested on the claim of the city of San Francisco as successor to the rights of a pueblo under a Mexican grant. The grounds for the decision were that the treaty of Guadalupe Hildago required the United States to protect property rights which had been created by the previous Mexican government, and in such event the doctrine of "equal footing" did not apply.[24]

The Act of Congress annexing the Hawaiian Islands recognized existing property rights by providing:

> The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United

[24] There is nothing inconsistent between the Hawaiian law of private ownership of fishponds and the federal power over navigation because the latter was merely a surrender of jurisdiction by the states of powers inherited from the Crown or acquired by the "equal footing" doctrine—only to the extent the states had jurisdiction over waters to surrender. The Kingdom of Hawaii never claimed jurisdiction over fishpond waters. *See* n. 21 *supra.*

States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.[25]

Upon enacting comprehensive legislation for the governance of the territory, *i.e.*, the Organic Act, as noted *supra* Congress specifically exempted fishponds from any change in status. This same protection was placed in the Hawaii Constitution, which Congress approved as a prerequisite to admission of Hawaii into the Union.[26]

Kuapa Pond, therefore, was never subject to any "common right of piscary," and was never servient to any "navigation servitude;" it was always the legal equivalent of fast land for property and "navigation" purposes. Therefore, its owners had the right to exclude the public therefrom, at least and certainly until they began transforming the land (and pond) into the Hawaii-Kai subdivision development.

This court now turns to consideration of whether or no the transformation of the pond into the Hawaii-Kai Marina and its subsequent use has altered the owner's legal rights with respect to any federal control over the waters and the public use thereof.

III. *Navigability and the navigation servitude of the Hawaii-Kai Marina in its present state and use*

A. *Navigability of the Hawaii-Kai Marina*

The government's claim of interstate commercial use of the marina seems to rely primarily upon the activities of the Marina Queen. Plaintiff's theory is that tourists trav-

[25] Act of July 7, 1898, 30 Stat. 750-51. As stated in note 24 *supra* and elsewhere in this decision, see section I *supra*, Hawaiian law of private ownership of fishponds is not inconsistent with the Constitution. None of the other exceptions to the recognition of existing property rights in the quoted sentence are applicable.

[26] Act of Mar. 18, 1959, Pub. L. No. 86-3, § 1, 73 Stat. 4.

eling in interstate commerce use the Marina Queen, albeit solely within the marina, as part of their journey. Any analogy to a *Yellow Cab*[27] type of commercial activity would be faulty, however, because in *Yellow Cab* the intrastate activity was a necessary link in an interstate chain of travel. Here it is merely a relaxing diversion that has *de minimis* impact on the interstate activities of tourists.[28]

There is other evidence, however, of current substantial use of the marina in interstate commerce. Defendants did not restrict use of the marina just to residents of Hawaii-Kai as an exclusive appurtenant to their lot purchase agreements, to permit them to launch their private recreational crafts into the marina's private waters, and enter Maunalua Bay by means of an artificial channel from the marina to the bay. Rather, Kaiser-Aetna also sells licenses to nonresidents to use the facilities of the marina for launching and mooring their boats, as well as use the marina waters as a highway by which to gain the open sea through the channel. By so doing, defendants transformed what was apparently conceived as a private recreational area into a combination harbor and canal available to any boat owner who was willing to pay the fee, subject only to the total use-capacity of the marina. Thus the

[27] *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) (intrastate transportation of passengers between train stations is part of the stream of interstate commerce sufficient to charge a violation of the Sherman Act).

[28] The *Yellow Cab* concept of "in commerce" as apparently never been applied by a court to establish federal commerce jurisdiction over navigation in waters artificially made navigable. *United States* v. *Underwood*, 344 F.Supp. 486 (M.D. Fla. 1972), dealt with a waterway that apparently was navigable in its natural state as a matter of law. *Utah* v. *United States*, 403 U.S. 9 (1971), dealt with navigability of the Great Salt Lake for title purposes. It was specifically rejected as an adequate test of interstate commerce, as Congress used the concept in the Rivers and Harbors Act, in *Hardy Salt Co.* v. *Southern Pacific Transportation Co.*, 501 F.2d 1156 (10th Cir. 1974).

marina is in fact used in interstate commerce both to raise revenue for Kaiser-Aetna and to transport residents and nonresidents by waterway into and out of Maunalua Bay.

Federal admiralty jurisdiction has long been held to apply to artificial waterways that in fact form highways of commerce between different states or into foreign commerce, over which vessels actually pass.[29] Thus a privately owned waterway may come within the term "navigable waters of the United States" as used in § 10 of the Rivers and Harbors Act if it *in fact*[30] supports interstate commerce.[31] The federal government has an intense interest in the quantity and safety of commercial traffic moving in interstate commerce, whether over natural or artificial channels, and possesses the constitutional authority to regulate the same.

If therefore follows that the waters of the marina cannot now be considered to be private property in and upon which its owners may do as they please without any possible federal regulation. As used by the defendants, the

[29] The canal cases cited by plaintiff are not directly relevant to this court's inquiry because they deal with the scope of federal *admiralty* jurisdiction. For example, in *Ex Parte Boyer*, 109 U.S. 629 (1884), a canal was held to be within the admiralty jurisdiction, and "public water of the United States . . . even though the canal is wholly artificial, and is wholly within the body of a State, and subject to [the State's] ownership and control . . . . " *Id.* at 632. The analogy to the question of Commerce Clause power, however, is an apt one, as the Supreme Court has noted. *See United States* v. *Appalachian Elec. Power Co., supra,* n. 9, at 408.

[30] The government urged a broader test of navigability, viz., susceptibility to commerce. However, the Corps of Engineers' regulations regarding navigability do not themselves adopt this test. *See* 33 C.F.R. 6 209.260(g)(1)(i), (iii) (1975), and Congress has no constitutional justification for acting until the private owner puts its property to work in interstate commerce.

[31] *Dow Chemical Co.* v. *Dixie Carriers, Inc.*, 330 F.Supp. 1304 (S.D. Tex. 1971), *aff'd* 463 F.2d 120 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972). *See also* 36 Op. Att'y Gen. 203 (1930).

marina has become the legal equivalent of a toll-charging canal or harbor and therefore subject to regulation by the Corps of Engineers under § 10 of the Rivers and Harbors Act.

This determination that the waters of the marina are subject to federal regulation, however, does not resolve all of the problems of this dispute.

B. *Regulation versus full exercise of the navigation servitude*

As indicated above, the dominant federal navigation servitude arises from the common law *public* right to pass over *naturally* navigable waters.[32] Because under common law no private property right exists in such waters, therefore there is no private "right" to be "taken" by government action.

Here, however, as stated above, there never existed any public rights in or to the waters of Kuapa Pond, nor did its transformation into the present marina, by private funding, create, *ipso facto,* any *public* rights therein or thereto.

As indicated by The Court in *Appalachian, supra,* when nonnavigable waters, previously private, are made suitable for navigation,

> *navigability, for the purpose of the regulation of commerce, may later arise.* An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable.

311 U.S. at 408 (footnotes omitted, emphasis added).

Because it was dealing solely with Congressional power to regulate, and not with an assertion of public rights to

[32] For an example of the difficulties attending a determination of whether waters are "naturally navigable", *see Appalachian, supra,* n. 9, at 407-18.

travel on the water, the Court did not discuss the navigation servitude. The Court continued, however:

> The plenary federal power over *commerce* must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing *power over commerce.*

Id. at 409 (footnotes omitted, emphasis added).

United States v. *Cress,* 243 U.S 316 (1917), (cited in *Appalachian*), together with *Appalachian,* clearly indicate that private "fast" lands and waters when made navigable by improvements or which could be made navigable are subject to Congressional regulation. Nevertheless while Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof.

Here then, since Kuapa Pond has been transformed into navigable waters used in commerce, the marina has therefore become subject to regulation by Congress and within admiralty jurisdiction. It does not follow, however, that the United States can, without payment, appropriate those waters for *public* use and deprive the defendants of their investment or any return on it.[33]

[33] *See also* 36 Op. Att'y Gen. 203 (1930).
This court does not imply that it believes that the *Appalachian* Court would have required compensation if Congress had been engaged in a project to improve the New River for purposes of public travel. Recognized title to property, or absence thereof, would be a major factor in determining the issue. The physical

If the government wants the marina opened to free public use, the defendants must be paid. This the government has not done.

IV. *Defenses*

Defendants argue that acquiescence by the Engineers, who did not insist upon permits during the planning and development of Hawaii-Kai, should affect the resolution of this case.[34] The Corps' seeming indifference to the creation, construction and use and the potential effect thereof upon commerce does not constitute a waiver or estoppel, however, since the constitutional power of Congress over the navigable waters cannot be impaired or restricted by any officer in the executive branch of government.[35]

Defendants claim that the National Environmental Policy Act § 102(2)(c), 42 U.S.C.A. § 4332(2)(c) (1973), requires the Corps of Engineers to issue an environmental impact statement before taking administrative action to declare the marina a navigable waterway is without merit. NEPA does not apply here. The initial declaration by the Corps merely asserted the existence of its *jurisdiction* under existing legislation, which had long ago given to the Corps the regulatory power over navigation aspects of

condition of the subject property would likewise be significant. At one extreme would be lands such as were the subject of *Cress.* At the other extreme would be a vast interstate river obstructed at only one point, by a few easily removable boulders. Compensation is required in the first case, but not necessarily in the second.

[34] Defendants' further argument, that the Engineers' prior lack of enforcement should limit the degree of injunctive relief available to the United States, *see United States* v. *Stoeco Homes, Inc.,* 498 F.2d 597, 610-11 (3d Cir. 1974), is moot because of this court's ruling, *supra,* that the federal navigation power over privately constructed artificial highways of commerce does not extend to assertion of public navigation servitude without just compensation.

[35] *Montana Power Co.* v. *FPC,* 185 F.2d 491, 495 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 947 (1951).

interstate commerce. Therefore, the Corps' recognition of the scope of its authority is not an "action" within the meaning of § 102(2)(c).[36]

CONCLUSION

The government's prayer for a declaration that Hawaii-Kai Marina is subject to § 10 of the Rivers and Harbors Act is GRANTED. The government's request for an injunction preventing defendants from denying public access to Hawaii-Kai Marina, and requiring them to notify the public of its accessibility is DENIED.

Plaintiff and defendants will submit proposed forms of the order.

Dated: Honolulu, Hawaii, February 6, 1976.

MARTIN PENCE
United States District Judge

[36] The Corps' initial declaration, when contested by defendants, is not dispositive of the issue. 33 C.F.R. § 209.260(b) (1975). Final determination of the question of navigability is made by the federal courts, which are not "agencies" for purposes of NEPA. *See* 5 U.S.C.A. § 551(1)(B) (1967). Preparation of an environmental impact statement and other procedures mandated by NEPA are not prerequisites to the Corps' determination, nor this court's finding that Hawaii-Kai Marina is a navigable waterway subject to federal regulation under the Rivers and Harbors Act.

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1978
CERTIORARI GRANTED FEBRUARY 20, 1979

INDEX

District Court Docket Entries

DATE	PROCEEDINGS
1973	
July 6	Complaint and Summons filed
July 26	First Amended Complaint filed
Sep. 17	Answer to Complaint filed
Oct. 5	Answer to Complaint filed
Nov. 6	Appearance and Withdrawal of Counsel filed—Bocken withdraw as counsel—Morry appearance for Defts Trustees (KING)
1974	
Aug. 12	Pretrial Order filed—pretrial set for 12-2-74 @ 9:00 a.m., Trial set for 12-17-74 @ 9:00 a.m., Ctrm. II. (PENCE)
1975	
Jan. 27	Entering Order—P/T set for 12-2-75 @ 9:00 a.m. (PENCE)
Feb. 11	Entering Proceedings—Non-Jury Trial—case contd to 3-10-75 @ 3:30 p.m. for report of counsel (PENCE)
Apr. 25	Entering Proceedings—Report of Counsel—Report by govt re ponds—Govt instructed to send notice to those who have fish ponds as indicated by Corps of Engrs & apprise them of the existence of this case & if they wish to intervene to do so by 4:00 p.m., July 3, 1975; also to publish in Advertiser, Star-Bulletin and newspapers on Maui, Kauai & Hawaii—Hrg on intervention set for July 7, 1975 @ 9:00 a.m. (PENCE)

DATE	PROCEEDINGS
1975	
Apr. 29	Entering Proceedings—conf—discussion re form of order & notice—verbal order of 4-25-75 SET ASIDE—Notice to be sent to fish pond owners inviting them to participate as amicus curiae & to file briefs, notice of appearance, etc by 4:00 7-3-75 & to appear in person at hrg on 7-7-75 @ 9:00 a.m., also to publish notice in newspapers (PENCE)
Apr. 30	Order filed; Notice of Pendency of Action filed (PENCE)
May 16	Stipulation for Substitution of Party Defendant filed—deft THOMPSON substituting for RICHARDS (PENCE)
Aug. 4	Order Granting Leave to Appear as Amicus Curiae filed (PENCE)
Oct. 29	Stipulation of Documentary Evidence filed
Oct. 30	First Stipulation of Facts filed; Second Stipulation of Facts filed; Agreed Statement of Facts filed
Nov. 17	Entering proceedings at PT—discussion re relevancy of exhibits (PENCE)
Nov. 19	Entering Proceedings—Trial—Pltf's Witnesses: John C. Belshe, Dr. Wm. Kikuchi and James P. McCormack CST—Pltf's Exhibits P-1 thru P-39, P-41 thru P-54, P-58 thru P-60 and P-56 admitted —Defts' Exhibits D-1 thru D-38 admitted—Further Trial contd to 11-20-75 at 9:00 a.m. (PENCE)

DATE	PROCEEDINGS
1975	
Nov. 20	Entering Proceedings—Further Trial—Dr. Wm. Kikuchi and John Belshe recalled—Pltf rest—Defts' Witnesses: Stanley Fujimoto and Han Jurgen Krock—Exhibit D-39 admitted—defts' rest—closing arguments—case submitted (PENCE)
Dec. 11	Entering Order—Court's exhibits 1 & 2 admitted (PENCE)
1976	
Feb. 6	Decision filed—govt's declaration that Hawaii-Kai Marina is subj to §10 of the Rivers & Harbors Act is Granted—govt's req for an injunction preventing defts from denying public access to Haw-Kai Marina, & requiring them to notify the public of its accessibility is Denied—Pltf & defts to submit proposed forms of the order—cc: USA, Bocken, Morry, Bunn, Kay (PENCE)
Feb. 26	Order and Judgment filed—notified: Bocken, Morry, USA, Kay, Bunn (PENCE)
Apr. 6	Notice of Appeal filed
Apr. 19	Notice of Cross-Appeal filed—cc 9th CCA, US
Apr. 20	Stipulation of Parties That Part of the Record be Retained in the District Court filed

Court of Appeals Docket Entries

DATE	PROCEEDINGS
1976	
May 3	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL
1978	
Feb. 14	ARGUED & SUBMITTED BEFORE: MERRILL, CUMMINGS & SNEED, CJJ
Aug. 18	As of Aug. 11, ORDERED OPINION (MERRILL) FILED & JUDG TO BE FILED & ENTD

First Amended Complaint

[R. 8]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KAISER-AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of The Bernice P. Bishop Estate; HAWAII KAI DEVELOPMENT Co.,

Defendants.

The UNITED STATES OF AMERICA, by its undersigned attorneys, by authority of the Attorney General, and at the request of the United States Army Corps of Engineers, alleges that:

I

This is a civil action for a Declaratory Judgment as authorized by Section 2201 of Title 28, United States Code, to declare the waters of Kuapa Pond a navigable water of the United States, and is brought because there is an actual controversy now existing between the parties to the above-entitled action as to which plaintiff seeks the judgment of this Court. This is also an action for injunc-

tive relief that would prohibit defendants from interfering with the public's right of access to the surface waters of Kuapa Pond, a navigable water of the United States.

II

This Court has jurisdiction over the subject matter of this action pursuant to Section 1345 of Title 28, United States Code, Section 2201 or Title 28, United States [R. 9] Code, Section 403 of Title 33, United States Code, and Article I, Section 8 of the United States Constitution (Commerce Clause).

III

The defendant Kaiser-Aetna is a partnership organized and existing under the laws of the State of California which is doing business in the District of Hawaii with its principal place of business in Honolulu, Hawaii. Kaiser-Aetna has developed a marina and associated facilities, known as Hawaii Kai, in and around the waters of Kuapa Pond.

IV

Defendant Bernice P. Bishop Estate, which is organized under the laws of the State of Hawaii, retains the fee interest in the lands beneath Kuapa Pond, and the individual defendants

(1) Richard Lyman, Jr.,

(2) Atherton Richards,

(3) Hung Wo Ching,

(4) Frank E. Midkiff, and

(5) Matsuo Takabuki

are the present trustees of the Bernice P. Bishop Estate who, by virtue of their offices, hold the title to the fee interest of all lands under Kuapa Pond.

V

Defendant Hawaii Kai Development Co. is, upon information and belief, a Nevada corporation doing business in the District of Hawaii and leases all lands under Kuapa Pond.

VI

Kuapa Pond, which is located at Maunalua Bay, District of Koolaupoko, City and County of Honolulu, Island [R. 10] of Oahu, State of Hawaii, is a navigable water of the United States.

VII

In connection with the development of Hawaii Kai, the defendant Kaiser-Aetna has carried out extensive dredging and filling operations in the navigable waters of Kuapa Pond and has created obstructions in Kuapa Pond by constructing structures in the waters of the Pond. Despite warnings from the United States Army Corps of Engineers to cease its construction activities in Kuapa Pond until it had obtained the necessary authorization pursuant to 33 U.S.C. Section 403, the defendant Kaiser-Aetna continued its dredging and filling of the Pond.

VIII

Without first securing the necessary authorization pursuant to 33 U.S.C. Section 403, the defendant Kaiser-Aetna

altered the condition and capacity of Kuapa Pond by dredging a channel connecting Kuapa Pond with the Pacific Ocean.

IX

The defendant Kaiser-Aetna at present does possess the authorization required by 33 U.S.C. Section 403 for work and operations in Kuapa Pond; however, defendant Kaiser-Aetna in its applications for permits issued by the U. S. Army Corps of Engineers pursuant to 33 U.S.C. Section 403 continues to challenge the Corps' authority to require permits for work and operations in Kuapa Pond.

X

In a letter dated December 6, 1972 to the District Engineer of the United States Army Corps of Engineers, the defendant Kaiser-Aetna asserted that the waters of Kuapa Pond are private and are solely for the use of Hawaii Kai [R. 11] Marina lot lessees and residents of Hawaii Kai who are licensed by Hawaii Kai to use the waters of Kuapa Pond. On at least one occasion, a patrol boat intercepted a private boat whose operator was attempting to enter Kuapa Pond from the coastal waters of Hawaii and advised him that the waters of Kuapa Pond were private and could be used only by residents of the marina or those licensed by Hawaii Kai.

XI

Upon information and belief, defendant Bernice P. Bishop Estate and its individual trustees named as defendants herein contest the U. S. Army Corps of Engineers'

determination that Kuapa Pond is a navigable water of the United States.

XII

Upon information and belief, defendant Hawaii Kai Development Co. contests the United States Army Corps of Engineers' determination that Kuapa Pond is a navigable water of the United States.

XIII

Upon information and belief, defendant Bernice P. Bishop Estate, its individuals trustees named as defendants herein, and defendant Hawaii Kai Development Co. contend that the waters in Kuapa Pond are private in nature for use only by residents of the Hawaii Kai Marina or those licensed in Hawaii Kai.

XIV

The defendants' actions, as described in Paragraphs VII-XIII, inclusive, amount to an actual and continuing controversy between the defendants and the United States of America.

XV

The United States of America and its citizens will [R. 12] suffer irreparable harm for which there is not adequate remedy at law unless the defendants are enjoined from denying the public free entry to the waters of the Pond.

WHEREFORE, the United States prays:

(1) That this Court adjudge, decree and declare the rights and legal relations of the parties to the subject mat-

ter here in controversy, in order that such declaration shall have the force and effect of a final judgment and decree;

(2) That this Court adjudge, declare and decree the surface waters of Kuapa Pond, also known as Hawaii Kai Marina, including all channels, a navigable water of the United States to the plane of the mean higher, high waters of the Pacific Ocean and that authorization for construction in Kuapa Pond be secured by defendants from the United States Army Corps of Engineers in accordance with 33 U.S.C. Section 403;

(3) That the defendants be permanently enjoined from interfering in any way with the public's right of access to the waters of Kuapa Pond;

(4) That the defendants be required to give notice to the public, by means deemed adequate by the Court, that the surface waters of Kuapa Pond and all channels, are not private waters from which the public is barred; and

(5) That the Court award such other and further relief as it deems just and proper.

Dated: July 26, 1973, at Honolulu, Hawaii.

HAROLD M. FONG
United States Attorney
District of Hawaii

By /s/ WILLIAM C. McCORRISTON
William C. McCorriston
Assistant U.S. Attorney

Answer to Complaint, Dated September 17, 1973

[R. 22]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of The Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,
Defendants.

Comes now KAISER AETNA and KAISER HAWAII-KAI DEVELOPMENT CO., by its attorneys, Damon, Shigekane, Key & Char, and in Answer to the Complaint state and allege as follows:

FIRST DEFENSE:

1. Defendants admit the allegations contained in paragraphs I, and II, IX, X, XI, XII, XIII, and XIV of plaintiff's Complaint.

2. Defendants admit the allegations contained in paragraph III but by way of clarification add that defendant, Kaiser Hawaii-Kai Development Co., is the lessee under

that certain indenture, dated October 17, 1967, whereby the defendants, Trustees of the Estate of [R. 23] Bernice Pauahi Bishop, leased Kuapa Pond to Hawaii-Kai Community Services Co., which lease was subsequently assigned by said Hawaii-Kai Community Services Co. to the defendant, Kaiser Hawaii-Kai Development Co. effective January 1, 1971.

3. Defendants admit the allegations contained in paragraph IV and on information and belief, allege that defendant, Estate of Bernice Pauahi Bishop, through its individual trustees, defendants, Richard Lyman, Jr., Atherton Richards, Hung Wo Ching, Frank E. Midkiff, and Matsuo Takabuki, retain the fee interest to all that body of water and lands thereunder known as Kuapa Pond, and not merely the lands under Kuapa Pond as plaintiff alleges, which Kuapa Pond is more particularly described in the aforesaid lease filed in the Bureau of Conveyances, State of Hawaii, Liber 5839, Page 69.

4. As to paragraph V of plaintiff's Complaint, defendants admit that defendant, Kaiser Hawaii-Kai Development Co., is a Nevada corporation registered to do business in the State of Hawaii, but by way of clarification, asserts that said defendant, Kaiser Hawaii-Kai Development Co., leases all of Kuapa Pond, which includes the waters of Kuapa Pond as well as the lands under it.

5. Defendants deny the allegations contained in paragraphs VI, VIII, and XV of the Complaint.

6. Defendant, Kaiser Aetna, admits that it has in the past carried out some dredging and filling operations in the waters of Kuapa Pond as alleged in paragraph VII without authorization pursuant to 33 U.S.C. Section 403, [R. 24] but denies that it created obstructions in Kuapa Pond, denies that such authorizations are or were necessary, and states that prior to the time it asserted jurisdiction, the Corps of Engineers did not require permits as it considered the waters to be private.

SECOND DEFENSE:

1. Certain lessees of marina lots, by virtue of leases from the Trustees of the Estate of Bernice P. Bishop, and certain licensees of the defendants have certain non-exclusive easements in common with the Trustees, and all others having rights through said Trustees, for rights of navigation and for other purposes in said Kuapa Pond, and that said lessees and licensees pay reasonable assessments to defendant, Kaiser Hawaii-Kai Development Co., to help defray the costs of the care, maintenance and operation of said Kuapa Pond, including without limitation, all taxes and premiums for hazard and liability insurance incurred in respect to said waters. Accordingly, said lessees and licensees have a property interest in and to Kuapa Pond which makes them indispensable parties to this action which, if the plaintiff prevailed, would adversely affect their property interests.

THIRD DEFENSE:

The action of the plaintiff, United States of America, in declaring the waters of Kuapa Pond to be public navi-

gable waters of the United States, is a taking of defendants' property for public use without compensation in violation of the Fifth Amendment to the United [R. 25] States Constitution.

FOURTH DEFENSE:

1. The United States Army Corps of Engineers has advised the defendants that it has no funds to maintain the waters of Kuapa Pond as it is now being maintained and patrolled by defendants, Kaiser Aetna, Kaiser Hawaii-Kai Development Co. and marina lot lessees and licensees. That unless the Pond is properly maintained through continuing maintenance efforts and enforcement of proper restrictions on the use of the waters, the environmental quality of said waters will be adversely affected and irreparable harm to the surrounding environment will result, particularly as a result of unrestricted public access and use.

2. Prior to its administrative determination that the waters of Kuapa Pond constitute navigable waters of the United States, the United States of America, plaintiff herein, through the United States Army Corps of Engineers, the agency prompting this Declaratory Judgment action, has failed to file an environmental impact statement assessing in detail the potential environmental impact of such determination; said impact statement being required by 42 U.S.C. §4332 (c); National Environmental Policy Act, Section 102 (2)(C) as said administrative determination constituted a major Federal action significantly affecting the quality of the environment.

3. Because of the failure to file an impact statement as aforesaid, the administrative determination that said waters are navigable waters of the United States of America is void and of no effect.

[R. 26] WHEREFORE, the defendants, Kaiser Aetna and Kaiser Hawaii-Kai Development Co. pray that:

(1.) Before any administrative decision can be made by any agency of the United States of America, including but not limited to the United States Army Corps of Engineers, that the waters of Kuapa Pond are public navigable waters of the United States, this Court require an environmental impact statement to be prepared as required by the National Environmental Policy Act of 1970.

(2.) This Court adjudge, declare and decree the surface waters of Kuapa Pond, also known as Hawaii Kai Marina, including all channels therein, to be non-navigable waters of the United States of America.

(3.) The Court award such other and further relief as it deems just and proper.

Dated: Honolulu, Hawaii, this 17th day of September, 1973.

/s/ R. CHARLES BOCKEN
R. Charles Bocken
Attorney for Defendants,
Kaiser Aetna and Kaiser
Hawaii-Kai Development Co.

Of Counsel:

DAMON, SHIGEKANE, KEY & CHAR

Answer to Complaint, Dated October 5, 1973

[R. 32]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of The Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Defendants.

Comes now RICHARD LYMAN, JR., ATHERTON RICHARDS, HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, trustees of The Bernice P. Bishop Estate, by their attorneys, Damon, Shigekane, Key & Char, and in Answer to the First Amended Complaint state and allege as follows:

FIRST DEFENSE:

1. Defendants admit the allegations contained in paragraphs I, II, XI, XII, XIII, and XIV of plaintiff's First Amended Complaint.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations

contained in paragraphs III, VII, IX and X, except that they admit that defendant, Kaiser Aetna, has participated in the development of the marina and associated facilities known as Hawaii-Kai in and around the waters of Kuapa Pond.

3. Defendants admit the allegations contained in paragraph IV and, further, allege that the Estate of Bernice Pauahi Bishop, through its individual trustees, defendants, Richard Lyman, Jr., Atherton Richards, Hung Wo Ching, Frank E. Midkiff, and Matsuo Takabuki, retain the fee interest to all that body of water and lands under Kuapa Pond as plaintiff alleges, which Kuapa Pond is more particularly described in the aforesaid lease filed in the Bureau of Conveyances, State of Hawaii, Liber 5839, Page 69.

4. As to paragraph V of plaintiff's Complaint, defendants admit that defendant, Kaiser Hawaii-Kai Development Co., is a Nevada corporation registered to do business in the State of Hawaii, but by way of clarification, asserts that said defendant, Kaiser Hawaii-Kai Development Co., leases all of Kuapa Pond, which includes the waters of Kuapa Pond as well as the lands under it.

5. Defendants deny the allegations contained in paragraphs VI, VIII, and XV of the First Amended Complaint.

SECOND DEFENSE:

1. Certain lessees of marina lots, by virtue of leases from the Trustees of the Estate of Bernice P. Bishop, and certain licensees of the defendants have certain non-exclusive easements in common with the Trustees, and all

others having rights through said Trustees, for rights of navigation and for other purposes in said Kuapa Pond, and that said lessees and licenseees pay reasonable assessments to defendant, Kaiser Hawaii-Kai Development Co., [R. 34] to help defray the costs of the care, maintenance and operation of said Kuapa Pond, including without limitation, all taxes and premiums for hazard and liability insurance incurred in respect to said waters. Accordingly, said lessees and licensees have a property interest in and to Kuapa Pond which makes them indispensable parties to this action which, if the plaintiff prevailed, would adversely affect their property interests.

THIRD DEFENSE:

1. The action of the plaintiff, United States of America, in declaring the waters of Kuapa Pond to be public navigable waters of the United States, is a taking of defendants' property for public use without compensation in violation of the Fifth Amendment to the United States Constitution.

FOURTH DEFENSE:

1. The United States Army Corps of Engineers has advised the defendants that it has no funds to maintain the waters of Kuapa Pond as it is now being maintained and patrolled by defendants, Kaiser Aetna, Kaiser Hawaii-Kai Development Co. and marina lot lessees and licensees. That unless the Pond is properly maintained through continuing maintenance efforts and enforcement of proper restrictions on the use of the waters, the environmental quality of said waters will be adversely affected and ir-

reparable harm to the surrounding environment will result, particularly as a result of unrestricted public access and use.

[R. 35] 2. Prior to its administrative determination that the waters of Kuapa Pond constitute navigable waters of the United States, the United States of America, plaintiff herein, through the United States Army Corps of Engineers, the agency prompting this Declaratory Judgment action, has failed to file an environmental impact statement assessing in detail the potential environmental impact of such determination; said impact statement being required by 42 U.S.C. §4332(c); National Environmental Policy Act, Section 102(2)(C) as said administrative determination constituted a major Federal action significantly affecting the quality of the environment.

3. Because of the failure to file an impact statement as aforesaid, the administrative determination that said waters are navigable waters of the United States of America is void and of no effect.

WHEREFORE, the defendants, Richard Lyman, Jr., Atherton Richards, Hung Wo Ching, Frank E. Midkiff, Matsuo Takabuki, trustees of The Bernice P. Bishop Estate, pray that:

(1) Before any administrative decision can be made by any agency of the United States of America, including but not limited to the United States Army Corps of Engineers, that the waters of Kuapa Pond are public navigable waters of the United States, this Court require an environmental impact statement to be prepared as required by the National Environmental Policy Act of 1970.

Answer to Complaint, Dated October 5, 1973

(2) All marina lot lessees and other licensees [R. 36] of the defendants as referred to in the Second Defense be made parties to this action.

(3) This Court adjudge, declare and decree the surface waters of Kuapa Pond, also known as Hawaii Kai Marina, including all channels therein to be non-navigable waters of the United States of America.

(4) The Court award such other and further relief as it deems just and proper.

Dated: Honolulu, Hawaii, this 5th day of October, 1973.

/s/ R. Charles Bocken
R. Charles Bocken
Attorney for Defendants, Richad Lyman, Jr., Atherton Richards, Hung Wo Ching, Frank E. Midkiff, Matsuo Takabuki, trustees of The Bernice P. Bishop Estate.

Of Counsel:

Damon, Shigekane, Key & Char

First Stipulation of Facts

[R. 255]

In the
UNITED STATES DISTRICT COURT
For the District of Hawaii
Civil No. 73-3864

United States of America,
Plaintiff,
vs.
Kaiser Aetna, *et al.*,
Defendants.

The United States of America, by and through its attorneys, and the defendants, through their attorneys, as evidenced by the signatures hereunder, hereby stipulate, agree, and consent to the admission of the following facts into evidence.

1. The average depth of waters in the Hawaii Kai Marina (Kuapa Pond) was originally dredged to approximately six (6) feet, and the average depth of waters in the main channel connecting Maunalua Bay with the Marina is approximately eight (8) feet.

2. Kaiser Aetna is responsible for overseeing the operations of the Marina. Since 1961, Kaiser Aetna has maintained a policy of excluding commercial vessels from the Marina, however, Kaiser Aetna has never decided whether or not commercial vessels can be operated by businesses in

the Koko Marina Shopping Center. At the present time, none are being operated although KAISER AETNA owns a [R. 256] vessel called the "Marina Queen", which can be used to transport up to twenty-five (25) persons on cruises in the Marina.

From late 1967 to the end of 1972, the "Marina Queen" was operated by Kaiser Aetna primarily to show developers the Hawaii Kai development. Also, on Sundays, the public was invited to join the cruises. The vessel ran three (3) or four (4) times a day, with an average load of ten (10) persons.

During the calendar year 1973, Kaiser Aetna turned over the operation of the "Marina Queen" to the Koko Marina Merchant's Association. The boat ran six (6) or seven (7) times a day, for the purpose of attracting people to the adjacent shopping facilities (Koko Marine Shopping Center). As a part of the promotion of the shopping center, KAISER AETNA chartered buses to pick up tourists at various points in Waikiki and transport them to the Marina. There the tourists were given a special package of shop discounts and a ride on the "Marina Queen". Tourists were charged $1.00 and later $2.00 per person for this service. During this period, 18,254 tourists and a total of 38,821 persons rode the "Marina Queen". The boat ride was avilable at no expense to anyone who came to the Marina.

During the first week of 1974 the promotion ended, and the "Marina Queen" has remained unused since that time except that the "Marina Queen" is now available for sales promotions and school children upon request. At all times, [R. 257] the "Marina Queen" operated solely within the waters of Kuapa Pond.

3. During 1974, a commercial scuba diving school boat picked up students at the Hawaii Kai Marina pier, but this operation was terminated by KAISER AETNA immediately after it learned of the activity.

4. The Hawaii Kai Marina has three (3) double slips sixty (60) feet in length.

5. During 1970, KAISER AETNA had plans to utilize part of the Marina for a boat rental concession. Those plans were discarded after the City informed KAISER AETNA that commercial boat operations are not allowed in private marinas under the Comprehensive Zoning Code.

6. The General Plan for Oahu, Detailed Land Use Map (March 1, 1966) shows resort development for an area adjacent to the Marina. KAISER AETNA has plans for resort development at Queen's Beach, Oahu, which is approximately two (2) miles from the Hawaii Kai Marina.

7. Andr[illegible] & Parker, A DICTIONARY OF THE HAWAIIAN LANGUAGE, defines "kuapa" as: "wall of a fish pond."

The UNITED STATES OF AMERICA and the defendants further agree that the affidavits of Warran Poehler, William Kinzley, Vernon Kalino, and Maurice Taylor may be admitted into evidence in lieu of live testimony and the statements contained in the affidavits are in accordance with what the testimony of the affiants would be if they were called as witnesses at trial; provided, however, that defendants [R. 258] shall have the right to object to the testimony in the affidavits and the matters contained in this Stipulation for lack of relevance or materiality.

First Stipulation of Facts

This "First Stipulation of Facts" together with the Second Stipulation of Facts supersedes those certain Stipulations of Facts filed on February 11, 1975.

So STIPULATED this 29 day of October, 1975, at Honolulu, Hawaii.

Respectfully submitted,

HAROLD M. FONG
United States Attorney
District of Hawaii

By /s/ STEPHEN D. QUINN
Stephen D. Quinn
Assistant U. S. Attorney
Attorneys for Plaintiff
United States of America

/s/ R. CHARLES BOCKEN
R. Charles Bocken
Attorney for Defendants
Kaiser-Aetna and Hawaii-Kai
Development Co.

/s/ G. RICHARD MORRY
G. Richard Morry
Attorney for Defendant
Trustees of the Bernice P.
Bishop Estate

Second Stipulation of Facts

[R. 260]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KAISER-AETNA, *et al.*,
Defendants.

IT IS HEREBY STIPULATED by and between the Plaintiff and the Defendants, through their respective attorneys, as follows:

1. On October 17, 1967, Kuapa Pond was specifically leased to the Kaiser Aetna interests by the Bishop Estate. The lease was subject to a Declaration of Protective Provisions which provided that every marina lot lessee had a non-exclusive easement with the Trustees and others so entitled "for purposes of navigation and access to the sea upon, over and across Kuapa Pond and all canals and other waterways thereof . . . ". Under the provisions of the Declaration, assessments were to be imposed on every marina lot to be used for the care, maintenance and operation of the marina (Kuapa Pond). As of December 31, 1974, there were 1,496 marina lot owners obligated to pay $72.00 annually for such maintenance. In addition, there were 175 non-marina lot owners who pay $72.00 per year

for boat privileges on [R. 261] Kuapa Pond. Since development of the marina, 668 boats have been registered and authorized to use the pond.

2. The Marina Fund is administered by Kaiser-Aetna, however, according to the Declaration of Protective Provisions, the Hawaii Kai Marina Home Owners Association will become the assignee of the lease to the marina waters (Kuapa Pond) and will administer the marina fund on April 27, 1991, or upon the expiration or termination of said Development Agreement, whichever date is earlier.

The 1972 financial statement of the Marina Fund, audited by the firm of Haskins and Sells, Certified Public Accountants, reflects a deficit of $92,706.00 for that year and a total deficit since inception of $338,260.00. These deficits have been subsidized annually by Kaiser-Aetna. Dredging costs incurred by Kaiser-Aetna over a ten year period ending December 31, 1973, total $2,245,548.00.

The Marina Fund is used to enforce the marina rules and regulations which have been established to protect the marina walls, avoid accidents, prevent dumping, collect debris created after heavy storms, and for certain other maintenance operations.

3. Neither the United States Army Corps of Engineers nor the Environmental Protection Agency has any funds appropriated nor programmed for the periodic dredging and continued maintenance of the Hawaii-Kai Marina. The United States Coast Guard has insufficient resources to patrol the Hawaii-Kai Marina except on an infrequent spot-check basis.

The zoning surrounding the Hawaii-Kai Marina [R. 262] will not permit the construction of hotels or resort facilities. Furthermore, Kaiser-Aetna has no present plans for seeking zoning which would permit hotel construction in the marina area.

4. The UNITED STATES OF AMERICA and the defendants further agree that the Affidavits of BARRY OKUDA, LAMBRETH HANCOCK and HANS-JURGEN KROCK may be admitted into evidence in lieu of live testimony and the statements contained in the Affidavits are in accordance with what the testimony of the affiants would be if they were called as witnesses at trial; provided, however, that the UNITED STATES OF AMERICA shall have the right to object to the testimony in the Affidavits and the matters contained in this Stipulation for lack of relevance or materiality.

This Second Stipulation of Facts, together with the First Stipulation of Facts, supersedes those certain Stipulations of Fact filed on February 11, 1975.

So STIPULATED this 29 day of October, 1975, at Honolulu, Hawaii.

/s/ STEPHEN D. QUINN
Stephen D. Quinn
Assistant U. S. Attorney
For HAROLD M. FONG
United States Attorney
Attorneys for Plaintiff

Second Stipulation of Facts

/s/ R. CHARLES BOCKEN
R. Charles Bocken
Attorney for Defendants
Kaiser-Aetna and Hawaii-Kai
Development Co.

/s/ G. RICHARD MORRY
G. Richard Morry
Attorney for Defendants
Trustees of the Bernice P.
Bishop Estate

[R. 264]

Agreed Statement of Facts

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,
Plaintiff,
vs.
KAISER-AETNA, *et al.*,
Defendants.

In its original state, Kuapa Fish Pond consisted of about 523 acres and extended approximately two miles inland from Maunalua Bay and the Pacific Ocean on the Island of Oahu, Hawaii. Kuapa Pond is contiguous to Maunalua Bay, and Maunalua Bay is a navigable water of the United States.

Kuapa Pond was historically a fish pond. The pond is fed by runoff waters from the surrounding mountains and hills. The fish pond together with surrounding land has at all relevant times been considered private property by the Hawaiian government and by the Trustees of the Estate of Bernice Pauahi Bishop (Bishop Estate) through a chain of title dated back to the Hawaiian monarchy.* The Bishop

* Kuapa Pond is a part of Royal Patent 4475, Land Court Award 7713, Apana 30 to Victoria Kamamalu, situate in the City and County of Honolulu. While the Pond was not described separately, it was included within the boundaries of the Royal Patent of the Land of Maunalua (Certificate of Boundaries signed by the Oahu Commissioner of Boundaries, June 13, 1884).

Estate and its lessees have paid and continue to pay real [R. 265] property tax assessments on the pond. Bishop Estate leased the pond to various individuals for the purpose of raising mullet. Some of these leases date back to 1903. The pond was always considered as private property by the owners, and the public has been consistently excluded from using the pond without proper authorization from the owners or their lessees.

In recorded history there were two openings from the pond to Maunalua Bay which is located on the other side of the sand bar. Fish gates were present at these openings and were constructed in such a way that they could be raised or lowered at the option of the lessee.

During periods of high tides, water from Maunalua Bay would enter the pond through the openings with a noticeable current. Correspondingly, during periods of low tides, the current flow would reverse toward the ocean. The water in the fish pond was brackish from the interchange of the salt water from the ocean and the fresh rain water from the mountains.

The Hawaiians utilized the tidal action in the pond to catch fish. In times of high tides the fish gates would be opened to allow mullet and other fish to enter with the current from the ocean. During low tides, wiremeshed fish gates would be lowered to allow water but not the fish to escape the pond. Thus allowing a "flushing" of the pond. Water depths in the pond varied between zero to two feet at high tide. Large areas in the mauka end were completely dry at low tide. When used as a fish [R. 266] pond prior to development, a few flat-bottomed shallow draft boats were operated by the fishermen in their work in Kuapa Pond.

During the early 1900s, Kalanianaole Highway was constructed upon the sand bar which separated Kuapa Pond from Maunalua Bay, and the Pacific Ocean. Coral Fill was placed on top of the sand bar to provide a foundation for the highway. In its earlier days, the highway would be flooded during some heavy storms. In more recent times, however, improvements to the highway's foundation have protected the highway from flooding.

On April 27, 1961, the Trustees under the Will of the Estate of Bernice Pauahi Bishop entered into a development agreement which provided the Kaiser-Aetna interests with the master development rights to a 6,000 acre area known today as Hawaii Kai. An integral part of that agreement included the right to lease the area known as Kuapa Pond and provide improvements, such as dredging, walls, and bridges. Development of a residential community and construction of waterways were commenced at that time, and a channel was dredged to improve the Koko Head opening connecting the pond with Maunalua Bay and the ocean.

Since the development of the marina, 668 boats have been registered and authorized to use the pond. As of 1975, the population of the Hawaii Kai area is estimated [R. 267] at approximately 22,000.

DATED: Honolulu, Hawaii, this 29 day of October, 1975.

/s/ STEPHEN D. QUINN
Stephen D. Quinn
Assistant U. S. Attorney
For HAROLD M. FONG
United States Attorney
Attorneys for Plaintiff

Agreed Statement of Facts

/s/ R. CHARLES BOCKEN
R. Charles Bocken
Attorney for Defendants
Kaiser-Aetna and Hawaii-Kai
Development Co.

/s/ G. RICHARD MORRY
G. Richard Morry
Attorney for Defendant
Trustees of the Bernice P.
Bishop Estate

[R. 417]

Order and Judgment

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 73-3864

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Defendants.

This action came on for trial on November 19 and 20, 1975, before the United States District Court for the District of Hawaii, Honorable MARTIN PENCE, United States District Judge, presiding, and the issues having been duly tried and a written Decision having been issued by the Court on February 6, 1976, and the Court having concluded that the prayer of the Plaintiff UNITED STATES OF AMERICA for a Declaration that Hawaii-Kai Marina is subject to Section 10 of the Rivers and Harbors Act should be GRANTED, but that the request of plaintiff UNITED STATES OF AMERICA for an injunction preventing Defendants from denying public access to Hawaii-Kai Marina and requiring them to notify the public of its accessibility should be DENIED,

Order and Judgment

[R. 418] IT IS HEREBY ORDERED AND ADJUDGED that the United States Army Corps of Engineers has jurisdiction to regulate the Hawaii-Kai Marina under Section 10 of the Rivers and Harbors Act, subject however to the right on the part of the Defendants to control and regulate public access to the Hawaii-Kai Marina.

DATED: Honolulu, Hawaii, this 26th day of February, 1976.

MARTIN PENCE
United States District Judge

APPROVED AS TO FORM:

/s/ STEPHEN D. QUINN
Stephen D. Quinn
Assistant U.S. Attorney
Attorney for Plaintiff
United States of America

/s/ R. CHARLES BOCKEN
R. Charles Bocken
Attorney for Defendant
Kaiser-Aetna and Hawaii-Kai
Development Co.

/s/ G. RICHARD MORRY
G. Richard Morry
Attorney for Defendants-Trustees
of the Bernice P. Bishop Estate

Plaintiff's Exhibit 1

DAEN-GCZ-C (12 Oct 72)
SUBJECT: Navigability of Kuapa Pond, Island of Oahu

To: DAEN-CWO-N FROM: DAEN-GCZ-A
DATE: 24 October 1972 CMT 2
Mr. Hedeman/37070/jf

1. By letters dated 7 March 1972 and 12 September 1972, (Inclosures 1 and 2) the Pacific Ocean Division has recommended that Kuapa Pond, Island of Oahu, Hawaii be declared a navigable water of the United States.

2. Kuapa Pond, which is a tidal body of water, extends inland for approximately two miles and is fed by run-off waters from the surrounding mountains and hills. The pond is surrounded by an extensive residential development known as Hawaii-Kai, which has been under development for over ten years by Kaiser Aetna. Numerous small pleasure craft, sail or motor powered, use the waters of Kuapa Pond for pleasure cruising, water skiing, and access to the Pacific Ocean.

3. Following a review of the materials submitted in the Division reports as well as the applicable case law, it has been determined that Kuapa Pond is a navigable water of the United States.

[signature illegible]

SELTZER

2 Incl
as

Plaintiff's Exhibit 1

PODOC 12 September 1972
SUBJECT: Kuapa Pond, Island of Oahu

HQDA (DAEN-GCJ)
WASH DC 20314

COUNSEL-file
CF PODCO-O

1. References:

a. Letter PODOC-D, 7 March 1972, subject: Navigable Waters of the United States, Kuapa Pond, Island of Oahu.

b. Phone Conversation—Ericsson/Cunningham, same subject as reference a, 30 August 1972.

2. On 11 January 1972 the District Engineer advised Kaiser Aetna that the requirements for permits for work in or discharges into Kuapa Pond would be strictly enforced (Incl 1). Ensuing events were reported in reference a, which requested your advice as to whether the waters of Kuapa Pond should be considered navigable waters of the United States.

3. As a result of recent disclosures through the news media, the District is now aware that Kaiser Aetna intends to construct additional docking facilities for rental. (Note: Kaiser Aetna presently, without permit, operates docking facilities in the waters for which it charges rental fees, and restricts the use of the waters of Kuapa Pond to residents who are "licensed" to use the waters for boating. A Kaiser Aetna boat patrols the area to advise any boat owner not so licensed that the use of the waters are not authorized.)

4. Accordingly, unless advised to the contrary on or before 20 September, the District Engineer intends to vigor-

Plaintiff's Exhibit 1

ously enforce the provisions of Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) in all reaches of the waters of Kuapa Pond, including referral for prosecution by the U. S. Attorney as may be appropriate. This action is considered necessary to prevent irreparable damage to the littoral waters surrounding Oahu. Inclosed for your better appreciation of the area are four aerial photos made on 22 December 1971.

FOR THE DISTRICT ENGINEER:

H. LLOYD ERICSSON
Division Counsel

2 Incl
1. Ltr PODCO-O, 11 Jan 72
2. Photos (4 prints)

Plaintiff's Exhibit 1

PODCO-O 11 January 1972

Kaiser Aetna
7120 Kalanianaole Highway
Honolulu, Hawaii 96825

OP BR-File

Gentlemen:

We have been reminded at a recent Corps of Engineers meeting with the local citizens group in your community that extensive construction activity (dredging, filling, retaining walls, navigation aids, and related work) has been accomplished in waters commonly known as Kuapa Pond and under development by your company.

By virtue of this body of water being connected through improved channels to navigable waters, this pond is considered to be an integral element of the navigable waters of the United States. As such, permits under 33 U.S.C. 403 and within the meaning of the River and Harbor Act of 1899 are required for work in Kuapa Pond.

This is to advise you that the requirements for permits for work in or discharges into the waters of Kuapa Pond will be strictly enforced. Any work in or discharges into Kuapa Pond in violation of the River and Harbor Act of 1899, as construed in the light of more recent environmental legislation, is subject to penalties under law.

Sincerely yours,

WILLIAM D. FALCK
Colonel, Corps of Engineers
District Engineer

Plaintiff's Exhibit 1

Ruddle/kh
M&R
COUNSEL-File

PODOC-D 7 March 1972

SUBJECT: Navigable Waters of the U.S.—Kuapa Pond, Island of Oahu

NQDA (DAEN-GCJ)
WASH DC 20314

1. The inclosed memorandum was prepared to facilitate our reply to the inclosed letter from the attorney for Kaiser Aetna, developers of the community known as Hawaii-Kai. Hawaii-Kai has been under development as a residential community for over 10 years. The majority of the property surrounding the body of water known as Kuapa Pond has been constructed or is in the development stage. Kuapa Pond, as it is now developed, reaches inland for approximately two miles and is fed by runoff water from the surrounding mountains and hills. Kuapa Pond is a tidal body of water.

2. The inclosed sketch shows the general layout of Kuapa Pond and the development around it. The pond is designated Hawaii-Kai marina on the sketch. The only commercial property along Kuapa Pond is the shopping center in the lower right portion of the pond. Residences around the pond range from single family dwellings to two-story condominium apartments. Berths for pleasure craft have been constructed adjacent to the shopping center and many residential units have private docks. Kaiser Aetna has performed considerable dredging and filling in developing the area as it now exists. Many small pleasure craft, sail or

Plaintiff's Exhibit 1

motor powered, use the waters for pleasure cruising or water skiing or as access to the ocean.

3. Only one permit has been issued by the Pacific Ocean Division for construction within the pond and this was for a fueling dock. The applicant (Kaiser Aetna) took exception to our references to these waters as navigable waters of the U.S. They did not acknowledge the permit and later built the fueling facility on land instead of on the water.

4. Request you advise if the waters of Kuapa Pond should be considered navigable waters of the United States.

FOR THE DIVISION ENGINEER:

DOUGLAS B. RUDDLE
Assistant Division Counsel

3 Incl
1. Cy memo
2. Cy ltr fr
   Atty Shigekane
   25 Jan 72
3. Sketch of Kuapa Pond

[Law memorandum omitted in printing]

Plaintiff's Exhibit 1

(Letterhead of Damon, Shigekane, Key & Char, 333 Queen Street, Honolulu, Hawaii 96813)

January 25, 1972

Department of the Army
Honolulu District, Corps of Engineers
Building 96, Fort Armstrong
Honolulu, Hawaii 96813

ATTENTION: William D. Falck
Colonel, Corps of Engineers
District Engineer

RE: *Kuapa Pond*

Gentlemen:

Your letter of January 11, 1972, wherein the U. S. Corps of Engineers asserts jurisdiction over Kuapa Pond, a private enclave, situate in Maunalua, Honolulu, Hawaii, was referred to our firm for study and reply.

While we can appreciate your concern, we cannot agree with the Corps of Engineers' claim of jurisdiction over Kuapa Pond. As you may know, Kuapa Pond was never considered "navigable waters of the United States" as that term is defined in various federal cases and opinions. Under laws peculiar to the Kingdom of Hawaii which were recognized by the United States and its Supreme Court at the time Hawaii became a U. S. territory, Kuapa Pond has been and is private property like other real property. No navigation of any kind, including pleasure boating, was

Plaintiff's Exhibit 1

possible until only recently when certain dredging activities were undertaken by Kaiser Aetna's predecessor. These activities did not transform Kuapa Pond into navigable waters subject to federal jurisdiction. We enclose a copy of the opinion in *Fairchild* v. *Kraemer,* 204 N.Y.S. 2d 823 (1960) for your information.

However, the position of Kaiser Aetna does not mean that it is unwilling to cooperate with the Corps of Engineers in the protection of our environment. It, too, is concerned about and interested in the preservation of Hawaii's natural beauty. Accordingly, Kaiser Aetna shall be happy to discuss with you matters which are of mutual concern.

Yours very truly,

/s/ HENRY H. SHIGEKANE
Henry H. Shigekane
Attorney for Kaiser Aetna

HHS:ejk
Enclosure
cc: Kaiser Aetna

[Opinion in *Fairchild* v. *Kraemer,* 204 N.Y.S. 2d 823 (1960), and map of Kaupa Pond omitted in printing]

Plaintiff's Exhibit 16

(Letterhead of Hawaii-Kai)

May 4, 1971

Department of the Army
Honolulu District, Corps of Engineers
Building 96, Fort Armstrong
Honolulu, Hawaii 96813

Gentlemen:

Subject: Public Notice No. PODCO 968-S

We noted in subject notice that "Kaiser Aetna . . . has applied to the Department of the Army for work in the navigable waters of the United States, Island of Oahu, Hawaii."

We wish to reemphasize a point made in our March 24, 1971 letter to you—that we are voluntarily applying for a permit regarding our dock fueling facility, that Kuapa Pond is an inland, private body of water, and that we do *not* consider said waters "navigable waters of the United States" as defined by law.

To avoid any misunderstanding, the public at large has never been and will not be permitted to enter the Pond. The fee interest is owned by Bishop Estate and the leasehold interest by us. Only authorized licensees of Kaiser Aetna are authorized to use the Pond for boating.

Very truly yours,

Kenneth D. H. Chong
Vice President and
Assistant Secretary

KDHC:ja

Plaintiff's Exhibit 17

(Letterhead of Department of the Army, Honolulu District, Corps of Engineers, Building 96, Fort Armstrong, Honolulu, Hawaii 96813)

PODCO-O

11 January 1972

Kaiser Aetna
7120 Kalanianaole Highway
Honolulu, Hawaii 96825

Gentlemen:

We have been reminded at a recent Corps of Engineers meeting with the local citizens group in your community that extensive construction activity (dredging, filling, retaining walls, navigation aids, and related work) has been accomplished in waters commonly known as Kuapa Pond and under development by your company.

By virture of this body of water being connected through improved channels to navigable waters, this pond is considered to be an integral element of the navigable waters of the United States. As such, permits under 33 U.S.C. 403 and within the meaning of the River and Harbor Act of 1899 are required for work in Kuapa Pond.

This is to advise you that the requirements for permits for work in or discharges into the waters of Kuapa Pond will be strictly enforced. Any work in or discharges into Kuapa Pond in violation of the River and Harbor Act of 1899, as construed in the light of more recent environmental legislation, is subject to penalties under law.

Sincerely yours,

/s/ William D. Falck
William D. Falck
Colonel, Corps of Engineers
District Engineer

Plaintiff's Exhibit 52

Marina Queen Attendance Record

			Total	*Tourists*
12/ 6/72	thru	12/13/72		135
12/14/72		12/20/72		261
3/ 3/73		3/ 9/73	1010	307
3/10/73		3/18/73	1417	192
(boat down for repairs)				
4/15/73	thru	4/21/73	1679	480
5/ 1/73		5/ 6/73	1483	510
4/22/73		4/30/73	1913	703
5/ 7/73		5/13/73	1071	587
5/14/73		5/20/73	840	518
5/28/73		6/ 3/73	1614	1036
6/14/73		6/10/73	1498	616
6/11/73		6/17/73	1118	381

6/21/73 report: There has been considerable discussion of the Marina Queen operations by members of the promotion committee concerning the cost involved. These will be detailed for both meetings today. Kaiser Aetna still retains the ownership of the boat. The merchants have merely assumed the operational responsibility for the boat.

6/18/73	thru	6/24/73	1376	557

6/28/73 report: Merchants Assn Board of Directors met Friday, June 22, 1973 and voted to assume responsibility for payment of the monthly operative cost for the Marina Queen through 1973.

6/25/73	thru	7/ 1/73	1209	479
7/ 2/73		7/ 7/73	1026	325
7/ 9/73		7/15/73	none as Marina Queen down for repairs	

Plaintiff's Exhibit 52

		Total	*Tourists*
7/18/73	7/22/73	1137	453
7/23/73	7/29/73	1510	643
no dates listed		1502	777
8/ 6/73	8/13/73	1872	819
8/13/73	8/19/73	1989	842
8/19/73	8/26/73	1489	610
8/27/73	9/ 2/73	1557	740
9/ 3/73	9/ 9/73	1086	575
9/10/73	9/16/73	913	516
9/17/73	9/23/73	884	543
9/24/73	9/30/73	994	631
10/ 1/73	10/ 7/73	669	442
10/ 8/73	10/14/73	744	623
10/15/73	10/21/73	866	485
10/22/73	10/28/73	1022	542
11/29/73	11/ 4/73	647	369
11/ 5/73	11/11/73	18	6
11/19/73	11/25/73	726	393
11/26/73	12/ 2/73		200
12/ 3/73	12/ 9/73	421	244
12/17/73	12/23/73	518	321
12/24/73	12/30/73	476	236
12/31/73	1/ 6/74	527	158
		38,821	18,254

1/14/74 Report: The operation of the Marina Queen has been suspended until further notice due to the fuel shortage and poor weather conditions. It is possible that the operation may be reinstated on a week end only basis later this year.

Plaintiff's Exhibit 54

(Letterhead of United States Coast Guard, Seventh Street SW, Washington, D.C. 20590)

27 Feb. 1973

From: Commandant
To: Commander, Fourteenth Coast Guard District(dl)

Subj. Navigable waters of the United States; Kuapa Pond, Oahu, Hawaii

Ref: (a) Ltr COMDT(GLMI) to CCGD14(dl), 5903/33-2, 24 Nov 1972

(b) Ltr CCGD14(dl) to COMDT(GLMI), 5903, 26 Dec 1972 w/encl.

(c) Bridge Permit File 17-67

1. Reference (a) forwarded for comment a proposed Corps of Engineers determination that subject waters are navigable waters of the United States. Reference (b) indicated concurrence with the proposed determination and recommended that the Coast Guard similarly determine that these waters are navigable waters of the United States for the purposes of Coast Guard jurisdiction.

2. In accordance with that recommendation, for the reasons stated below, it is hereby determined that the waters of Kuapa Pond, Oahu, Hawaii are navigable waters of the United States and, accordingly, waters subject to the jurisdiction of the United States for the purposes of Coast Guard jurisdiction.

3. Kuapa Pond is fed by fresh water run off from surrounding hills and mountains and drains through two nar-

row passages into Maunalua Bay and the Pacific Ocean. Prior to 1958 this waterbody served solely as a fish pond. On 30 March of that year, however, the owners of the land areas surrounding the pond and the submerged lands beneath it entered into a long term development agreement with private developers. In accordance with this agreement Kuapa Pond has been dredged, portions of the shore areas have been filled, and much of the adjacent land areas have been developed as residential and commercial properties. One immediate result of this development has been a large increase in the use of Kuapa Pond by recreational craft. As an indication of this use reference (b) notes that approximately 840 boat numbers have been issued to residents living in the area and that there is a privately maintained aid to navigation system in operation within the pond. While the use of the waters of the pond has been limited to residents, see reference (b), there is at least one dredged channel connecting these waters to Maunalua Bay and the Pacific Ocean. The plans accompanying the permit application for a bridge across this channel indicate that, prior to the bridge's construction and the channel's dredging, the channel at that time was 6.2 feet deep at the bridge site. Reference (c).

4. This extensive use by recreational craft coupled with the navigational improvements made in the pond (channel dredging and establishment of aid to navigation system) indicate its capability for use by the public for purposes of transportation and commerce; notwithstanding the denial of this use to the public by the developers. The dredged channel connecting the pond with the open sea provides the

means by which this transportation and commerce might be conducted between the states and foreign countries.

5. Waters which are susceptible of being used in their ordinary condition as highways of interstate and foreign commerce are navigable waters of the United States. *The Daniel Ball,* 10 Wall. 557, 563 (1871). *In United States v. Appalachian Electric Power Co.,* 311 U.S. 377 (1940) the Supreme Court developed this principle and declared that:

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. . . . A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. *Id* at 407.

6. The weight to be given to evidence of private vessel usage of a waterway in determinations concerning navigable waters of the United States was discussed in the same decision. Earlier the Court in *United States v. Utah,* 283 U.S. 64 (1932), stated that:

> The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. *Id* at 82.

Citing that passage the Court in *United States v. Appalachian Electric Power Co., supra,* held:

> Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simple types of commercial navigation. *Id* at 416.

7. A recent decision handed down by the District Court of the Western District of Washington held that a lagoon located immediately adjacent to the Strait of Juan de Fuca is not part of the navigable waters of the United States. *Pitship Duck Club v. Town of Sequim,* 315 F. Supp. 309 (1970). The facts in that case, however, were (as stated by the court) that:

> At times during most days of the year, small boats can enter the lagoon from the strait and navigate to the Club's property. *Most of the time, however, small boats cannot enter the lagoon. Id* at 310. [Emphasis added].

8. While the use and disposal of the beds of navigable waters are determined in accordance with the laws of the state having jurisdiction, it is a well established principle that this use and disposal is subject to Congress' power to control the superjacent waters for the purposes of navigation in commerce among the states and with foreign nations. See *United States v. Holt Bank,* 240 U.S. 49, 54 (1925).

9. The waters of Kuapa Pond and the channel connecting it to the sea have been improved to the point where they constitute a highway for interstate and foreign commerce. *United States v. Appalachian Electric Power Co., supra.* The extensive use of these waters by recreational craft

(C.F. *Pitship Duck Club v. Town of Sequim, supra*) clearly demonstrates their susceptibility for commercial navigation, thereby according them the status of navigable waters of the United States. *United States v. Utah, supra; United States v. Appalachian Electric Power Co., supra.* The fact that the bed of the pond is owned by private concerns does not alter this. *United States v. Holt Bank, supra.*

10. This determination represents the opinion of the Coast Guard as to the extent of its own jurisdiction. It should not be construed as an opinion concerning the jurisdiction of the United States, as such a determination can only be made through judicial or legislative proceedings.

/s/ C. R. BENDER
C. R. Bender

Plaintiff's Exhibit 59 Without Photographs

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,
Plaintiff,
vs.
KAISER-AETNA, *et al.*,
Defendants.

AFFIDAVIT OF WILLIAM H. KINZLEY

STATE OF HAWAII
CITY AND COUNTY OF HONOLULU, *ss.*:

WILLIAM H. KINZLEY, being first duly sworn on oath, deposes and says:

That I am a First Lieutenant in the U.S. Army Corps of Engineers presently assigned to the 84th Engineer Battalian Construction, C Company, Schofield Barracks. My former assignment was with the Operations Branch, Construction-Operations Division, U.S. Army Engineer Division, Pacific Ocean, where part of my duties involved investigations of work in navigable waters to determine if there were violations of the Federal statutes which the Corps of Engineers enforces.

That on 25 April 1974 I conducted an investigation in the upper reaches of Kuapa Pond, Hawaii, to determine the effects of the tides on the pond. I placed a 48-inch metal

ruler in the water in the upper portion of Kuapa Pond in the vicinity of Huupii Place. This is in the left arm of Kuapa Pond as you go mauka of the Wailua Street bridge.

That the results of that investigation are tabulated below relating the times and depths represented by the photographs indicated below and attached hereto. The exhibit numbers appear on the reverse of the photographs.

Photographic Exhibit No.	*Time of Photograph*	*Depth of Water on a 48" Ruler*
32 (24-25)	1100 hours	15"
34 (26)	1200 hours	16¾"
35 (27)	1600 hours	37½"
36 (28)	1700 hours	42½"
37 (29)	1745 hours	45"

One other measurement was taken at 1800 hours in the same location with a depth reading on the ruler of 44¾". The measurements above reflect a 30-inch difference in the water level between 1100 hours and 1745 hours.

Further Affiant sayeth not.

WILLIAM H. KINZLEY

Attachments
Exs. 32, 34, 35, 36 & 37

Subscribed and sworn to before
me this —— day of February, 1975.

MASAO TANIMOTO
Notary Public, 1st Judicial Circuit
State of Hawaii
City and County of Honolulu
My Commission Expires on May 28, 1977

Plaintiff's Exhibit 60

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,
Plaintiff,
vs.
KAISER-AETNA, *et al.*,
Defendants.

AFFIDAVIT OF VERNON B. KALINO

State of Hawaii
City and County of Honolulu, *ss.*:

VERNON B. KALINO, being first duly sworn on oath, deposes and says:

That I have lived in Hawaii my entire life and have on many occasions visited Kuapa Pond. My first visit to that area would have been about 1948. I am familiar with the operation of the fish pond and the fish gates which were at the entrance to Kuapa Pond on the mauka side of the Kokohead bridge. These gates consisted of rock walls spaced about six to eight feet apart. The wall extended above the water surface about two to three feet. Between the walls were gates made of wood frames with chicken wire type interiors. The gates were constructed so they could be raised and lowered. The operators would raise

Plaintiff's Exhibit 60

the gates when the tide came in and then lower them to trap the fish that had entered the pond. I was aware that the tides affected Kuapa Pond in those days because I could see the current moving into the pond when the tides rose and moving back out as the tide lowered.

Further Affiant sayeth not.

VERNON B. KALINO

Subscribed and sworn to before
me this —— day of February, 1975.

MASAO TANIMOTO
Notary Public 1st Judicial Circuit
State of Hawaii
City and County of Honolulu
My Commission Expires on May 28, 1977

Defendants' Exhibit 14

(Letterhead of Department of the Army, Honolulu District, Corps of Engineers, Bldg 96, Ft. Armstrong, Honolulu, Hawaii 96813)

In Reply Refer to
POHVK 799-D

5 April 1966

Mr. D. M. Snow
Project Engineer
Kaiser Hawaii-Kai
P. O. Box 2997
Honolulu, Hawaii 96802

Dear Sir:

Reference is made to your letter dated 28 March 1966 and attached drawing showing the proposed Hawaii-Kai Marina Bridge and Channel.

The following are comments on your proposed work:

a. The proposed new structure will not interfere with any Federal navigation project, and enlargement of the channel will improve circulation in the Kuapa Pond.

b. From observations, the tidal prism in Kuapa Pond produces relatively high velocities through the existing channel. Whether or not velocities through the proposed channel will be hazardous to small boat navigation is not known.

c. The clearance through the proposed structure is an improvement over present conditions.

d. The deepening of the channel may cause erosion of the beach in the Portlock area. A jetty on the Koko Head side of the channel may be found necessary to retain the beach and reduce shoaling in the channel.

Sincerely yours,

/s/ Everette A. Flanders
Everette A. Flanders
Chief, Construction Division

Defendants' Exhibit 15

(Letterhead of Kaiser Hawaii-Kai Development Co.,
7120 Kalanianaole Highway, P.O. Box 2907,
Honolulu, Hawaii 96802)

April 26, 1966

Department of the Army
Honolulu District, Corps of Engineers
Building 96, Fort Armstrong
Honolulu, Hawaii 96813

Subject: *Hawaii-Kai Marina Bridge*

By your letter of April 5, 1966, you indicated general concurrence with our proposal for the Marina Bridge.

It is our understanding that no separate federal permit will be required for this construction, and that there will be no requirement for public use or control of any waters on the Kuapa Pond side of the bridge.

Very truly yours,

D. M. Snow
Project Engineer

DS:hk

/s/ Everette A. Flanders
Everette A. Flanders
Chief, Construction Division

Defendants' Exhibit 36 Without Maps

In the
UNITED STATES DISTRICT COURT
For the District of Hawaii
Civil No. 73-3864

United States of America,
Plaintiff,
vs.
Kaiser-Aetna, *et al.*,
Defendants.

Affidavit of Barry Okuda

State of Hawaii,
City and County of Honolulu, *ss.*:

Barry Okuda, being first duly sworn on oath, deposes and says:

That I am a civil engineer and have been employed by Kaiser-Aetna and its predecessors in interest since June, 1965. One of my responsibilities was to coordinate with government agencies concerning certain construction plans and required permits in the development of the Hawaii-Kai Marina.

Sometime during the latter part of 1966 or early 1967, Kaiser-Aetna was preparing plans for the construction of the Hawaii-Kai Marina Bridge and also channel excavation which would permit access to Maunalua Bay and the ocean for boaters permitted to use the Hawaii-Kai Marina. At

that time, I confirmed with the Corps of Engineers and the U.S. Coast Guard that their prior approval for this project was necessary. This was a requirement because the channel excavation was to be performed in Maunalua Bay, and the bridge was to be built within land owned by the State of Hawaii abutting Maunalua Bay. (See Attachment "A").

Prior to that time, I had discussions with the Corps of Engineers concerning not only the Hawaii-Kai Marina Bridge but the Hawaii-Kai Drive Bridge. I was told that neither the Hawaii-Kai Drive Bridge nor the dredging of the Marina (Kuapa Pond), which was going on about that time, required Corps of Engineers or Coast Guard approvals since the Marina waters were private. Accordingly, this work, as well as other bridges (see Attachment "B"), walls, docks and dredging within the Marina were done without Corps permits and without any objection from the Corps and Coast Guard until 1972 when Kaiser-Aetna was notified that the waters of the Marina (Kuapa Pond) were considered navigable waters of the United States.

Further Affiant sayeth naught.

/s/ Barry Okuda
Barry Okuda

Subscribed and sworn to before
me this 6th day of February, 1975.

Lorene K. L. Yoshiyama
Notary Public, First Judicial Circuit
My commission expires: August 29, 1978

[Attachments "A" and "B" omitted]

Defendants' Exhibit 37

In the
UNITED STATES DISTRICT COURT
For the District of Hawaii
Civil No. 73-3864

United States of America,
Plaintiff,
vs.
Kaiser-Aetna, *et al.*,
Defendants.

Affidavit of Lambreth Hancock

State of Hawaii,
City and County of Honolulu, *ss.*:

Lambreth Hancock, being first duly sworn on oath deposes and says:

That I was employed by Kaiser Hawaii-Kai Development Co. before the beginning of the development stage and was familiar with Kuapa Pond and its surrounding area prior to dredging and construction activity. During the early years with Kaiser Hawaii-Kai Development Co., I was an administrative assistant to Henry J. Kaiser. Subsequently, I was vice-president of the company until my retirement in July 1975.

Prior to its development, Kuapa Pond was used to raise mullet and other fish by persons who leased the Pond from the Trustees of the Bishop Estate. The water was shallow and often had a very foul odor—particularly at low tide.

Defendants' Exhibit 37

Surrounding the Pond were several pig farms and many areas had developed into unofficial dumping grounds for refuse, junked cars, refrigerators, etc. There was also some grazing of livestock and poultry raising. The few homes that surrounded the Pond had cesspools as no city sewer system was available. During heavy rains, refuse and waste from the pig farms, refuse areas, etc. washed into the Pond.

Since the development of Kuapa Pond into the Hawaii-Kai Marina, pig farms, livestock and poultry raising have been relocated out of the watershed and sewage is piped away to a sanitary treatment plant built by the development company. Dumps and rubbish areas no longer exist around the Pond.

At the present time, the primary use of the Hawaii-Kai Marina is recreational. Sailing, boating and water-skiing are the most popular activities followed by crabbing, fishing and swimming.

My house is located near the Marina bridge and I have had much opportunity to observe the action of the Pond before and after the dredging operations. While I noticed odors before the Pond was developed, I have noted no unpleasant odor since the development of the Marina complex either at high or low tide.

I have noticed also the absence of limu growth and water lettuce since the development of the Marina. Such growth is usually a sign of water stagnation. I have, however, noted an opihi-like shellfish establishing their colonies on the shoreline of several areas within the Marina. These shellfish thrive in fresh ocean water and were not found in Kuapa Pond prior to its development.

Defendants' Exhibit 37

The twelve mile shoreline within the Marina is stabilized by a gravity boulder wall consisting of large boulders placed one on top of another up to the low water line, and small "man-size" boulders placed from the low water line to about 3′ above sea level. The front face is mortared to resist surface wave wash. The walls were constructed at great expense to Kaiser Hawaii-Kai Development Co. and Kaiser Aetna.

Rules and regulations governing the use of the Marina have been established to maintain the quiet and privacy of the Marina area and its surrounding residences, and to permit a controlled recreational use of the waterways. A Marina Patrol is maintained seven days a week plus occasional night patrols. On weekends and holidays there are at least two patrol boats on duty and sometimes three. The patrol boats not only insure the privacy of the waters and enforce safety regulations, but also perform such jobs as removing floating debris which often follows storms.

Further Affiant sayeth naught.

/s/ Lambreth Hancock
Lambreth Hancock

Subscribed and sworn to before
me this 7th day of February, 1975.

Lorene K. L. Yoshiyama
Notary Public, First Judicial Circuit
My commission expires: August 29, 1978

Court Exhibit 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civil No. 73-3864

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KAISER AETNA, *et al.*,

Defendants.

POST TRIAL STIPULATION OF FACTS

In addition to Hawaii-Kai Marina lot lessees, approximately eighty-six (86) other Hawaii-Kai residents are licensed to use the marina facilities and pay fees for the full use of the marina waters (Kuapa Pond). Only marina lot lessees or Hawaii-Kai residents are permitted full privileges of using the waters of the marina.

However, fifty-six (56) non-residents of Hawaii-Kai have been extended the limited privilege of renting slips at the marina boat docks. For this privilege, non-residents pay the full monthly marina fees plus slip rental fees. These non-residents are not permitted the use of the waters of the marina other than the right of ingress and egress from the dock slip facility to Maunalua Bay.

Court Exhibit 1

SO STIPULATED this day of December, 1975, at Honolulu, Hawaii.

Respectfully submitted,

HAROLD M. FONG
United States Attorney
District of Hawaii

By .....
STEPHEN D. QUINN
Assistant U. S. Attorney
Attorneys for Plaintiff
United States of America

/s/ R. CHARLES BOCKEN
R. CHARLES BOCKEN
Attorney for Defendants
Kaiser-Aetna and Hawaii-
Kai Development Co.

/s/ G. RICHARD MORRY
G. RICHARD MORRY
Attorney for Defendant
Trustees of the Bernice
P. Bishop Estate

Court Exhibit 2

(Letterhead of Kaiser Hawaii-Kai Development Co.,
7120 Kalanianaole Highway, P.O. Box 2907,
Honolulu, Hawaii 96802)

March 28, 1966

District Engineers
United States Army Engineers
District—Honolulu
Fort Armstrong
Honolulu, Hawaii

Attention: Operations (Bldg. 96)

Gentlemen:

Subject: Proposed Hawaii-Kai Marina
Bridge & Channel

We are forwarding for your comment, a copy of a drawing showing the proposed Hawaii-Kai Marina Bridge and Channel, as recommended by the State Division of Highways. The marina access is to be obtained by raising a section of Kalanianaole Highway in the vicinity of Kuapa Bridge and replacing the existing bridge with a 225-foot long bridge with a bottom elevation over a portion of the span of 13.5 MSL, as a means of obtaining adequate clearance for boats entering the marina.

In addition, the channel, of approximately 200 feet in width, will be dredged to about -9 MSL to permit boat traffic as well as to provide a greatly improved drainage outlet for Kuapa Pond.

Court Exhibit 2

We would appreciate your comments on this proposed plan at your earliest convenience. We realize, of course, that your views will be preliminary in nature and that final approval will depend on detailed design of the bridge and channel.

Very truly yours,

/s/ D. M. Snow
D. M. Snow
Project Engineer

No. 78-738

In the Supreme Court of the United States

OCTOBER TERM, 1978

KAISER AETNA; BERNICE P. BISHOP ESTATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

RAYMOND N. ZAGONE
KATHRYN A. OBERLY
MARTIN GREEN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Cases—Continued — Page

Cases—Continued — Page

Statutes and regulations:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 584 F.2d 378. The opinion of the district court (Pet. App. 13a-34a) is reported at 408 F. Supp. 42.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1978. The petition for a writ of

certiorari was filed on November 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a privately-owned fishpond became a navigable water of the United States to which the public has a right of access when it was converted by a private developer into a marina with private mooring facilities for more than 600 boats and with a main channel eight feet deep leading to the Pacific Ocean.

STATEMENT

For hundreds of years prior to 1961, Kuapa Pond, on the Island of Oahu in Hawaii, was used to cultivate mullet. Separated from Maunalua Bay and the Pacific Ocean by a narrow barrier beach reinforced with a stone wall, the pond was fully enclosed and no more than two feet deep. Mullet were seeded in the pond, grown, and harvested. During high tides, sea water from the bay and ocean entered the pond through sluice gates in the barrier, allowing small fish and water to enter but not allowing large fish to escape, thus flushing the pond and enriching the crop (Pet. App. 15a-16a). Such "fishponds" are characteristic geographical features in Hawaii and have provided an important source of food (Pet. App. 3a).

In 1961 the Bishop Estate, owner of the pond and surrounding land, leased 6,000 acres including the pond to Kaiser Aetna for the development of a subdivision and marina called Hawaii-Kai. The plans contemplated that the pond would first be dredged and filled without opening it to the sea; the Corps of Engineers was notified of these plans, and advised Kaiser Aetna that no permit would be required. Later, Kaiser Aetna notified the Corps that it planned to dredge a channel between the pond and Maunalua Bay, and it did so without objection from the Corps (Pet. App. 17a-18a).

Today, the Hawaii-Kai subdivision has approximately 22,000 residents (Pet. App. 18a). The marina and the pond, consisting of 523 acres of surface water and extending approximately two miles inland from the bay (Pet. App. 15a), are used by some 668 boats belonging mainly to residents of the subdivision, but also to 56 non-residents who pay a fee for the right to moor their boats at the marina and to travel across the pond to the ocean (Pet. App. 18a-19a). The average depth of the pond/marina is now six feet, with a main channel of eight feet (Pet. App. 18a). The pond is no longer enclosed and no longer used to cultivate fish. It is intended and used for navigation,[1] and since the channel connecting the marina and bay is unobstructed, the waters of the pond and the

[1] The navigation use has included commercial carriage. Kaiser Aetna owns and operates on the marina a small vessel called the Marina Queen which it has used to carry members of the public for the purpose of attracting them to the marina shoreside and shopping facilities. More than 38,821 persons have ridden the vessel, many of them paying a fee that included the ride and a package of shopping discounts (Pet. App. 19a).

marina ebb and flow with the tides of the Pacific Ocean (Pet. App. 20a).

Petitioners desire to exclude from the pond all persons other than those who are subdivision residents or who rent space at the marina. To this end, petitioners have used patrol boats to intercept and block other vessels from entering the pond.[2] In order to prevent such obstructions, the United States, on behalf of the Corps of Engineers, commenced this lawsuit against petitioners in the district court in 1973. The suit sought a declaration that the waters of the pond are navigable waters of the United States and an order forbidding petitioners from continuing to dredge and fill the pond without a permit from the Corps of Engineers and forbidding them from barring access to the pond by members of the public.

The district court held that the waters of the pond are navigable waters of the United States and therefore, under the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, may not be altered, dredged, or filled without the approval of the Corps of Engineers. The court rejected, however, the government's claim of a public right to use those waters. Both sides appealed. The court of appeals upheld the district court's determination that the waters of the pond are

[2] The First Amended Complaint alleged that petitioners used patrol boats to obstruct passage into the pond by members of the public (C.A. App. 11). Petitioners admitted that "[o]nly lessees of marina lots and persons who pay an annual assessment for boating privileges have been allowed to use the waters of the pond. The general public has always been excluded" (C.A. App. 47).

navigable waters of the United States and therefore subject to the Rivers and Harbors Act of 1899, and the court reversed the district court's ruling denying a right of public access to those waters. Petitioners seek review of only the latter holding (see Pet. 2, 15).

ARGUMENT

The petition should be denied because the decision below is correct and because the issue presented is unlikely to recur.

1. All waters which are subject to the ebb and flow of the tides or which are navigable in fact are navigable waters of the United States; as such they are subject to federal regulation and are impressed with a navigation servitude on behalf of the public.

The origins of the public right to navigation are lost in antiquity. The right dates at least from the Roman Empire. Institutes of Justinian, Book 2, Title 1, § 2. It was recognized in Chapter 23 of Magna Carta. See W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 343 (Glasgow, 1914). English common law recognized the public right to navigate rivers and ports. *De Jure Maris* in Hargrave, *Tracts Relative to the Law of England*, pt. 1, ch. 3 at 9 (1787); H. Bracton, *Legibus et Consuetudinibus Angliae*, bk. 1, ch. 12, § 6 at 57 (Twiss ed. 1878). American colonists enjoyed and depended on this tradition: "[F]rom the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters, for the

same purposes, and to the same extent, that they have been used and enjoyed, for centuries, in England." *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842).[3]

From the earliest days of this country, the federal government has acted to protect the public right of navigation. The final sentence of Article IV of the Northwest Ordinance of 1787, 1 U.S.C. page XLIII, provided:

> The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Similar provisions were incorporated into organic acts admitting at least nine states (but not Hawaii)[4] to the United States. See Leighty, *The Source and*

[3] In arriving at this conclusion, the Court pointed out that King Charles II's charter to his brother, the Duke of York, required the duke to establish for New Jersey a government "as near as might be, agreeable, in their new circumstances, to the laws and statutes of England." "[H]ow could this be done," the Court inquired, "[i]f the shores, and rivers and bays and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke, for his own individual emolument?" 41 U.S. (16 Pet.) at 413.

[4] The Hawaiian Organic Act is discussed at pages 12-18, *infra*.

Scope of Public and Private Rights in Navigable Waters, 5 Land and Water L. Rev. 391, 416 n.101 (1970). These provisions have been applied to require clear passage for the public. *Silver Springs Paradise Co.* v. *Ray*, 50 F.2d 356, 358 (5th Cir. 1931); see also *Hamilton* v. *Vicksburg, Shreveport & Pacific R.R.*, 119 U.S. 280, 284-285 (1886); *Huse* v. *Glover*, 119 U.S. 543, 548 (1886); *Leverich* v. *Mayor of Mobile*, 110 F. 170, 172 (1867); *Jolly* v. *Terre Haute Drawbridge Co.*, 13 F. Cas. 920-921 (D. Ind. 1853) (No. 7,441).

To prevent obstructions to navigation, Congress, beginning in 1870, enacted a series of "rivers and harbors" acts that were re-codified in the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* That Act confers on the Secretary of the Army broad authority to regulate the nation's waterways in order to keep them open for navigation.[5] See generally *United*

[5] Section 401 prohibits the construction of bridges, dams, dikes, or causeways over or in any port, roadstead, haven, harbor, navigable river or other navigable waters of the United States without the consent of Congress or of the Chief of Engineers and the Secretary of the Army. Section 403 prohibits any obstructions to the navigable capacity of any port, roadstead, haven, harbor, canal, navigable river or other navigable waters of the United States without the prior approval of the Corps of Engineers or Congress. Section 404 authorizes the Secretary of the Army to establish harbor lines beyond which no piers or other works may be constructed. Section 409 makes it unlawful to tie up or anchor vessels so as to prevent passage of other vessels and requires owners to remove sunken vessels. Section 414 authorizes the Secretary of the Army to remove sunken vessels from rivers, lakes, harbors, sounds, bays, canals or other navigable waters.

States v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960).

The historic right of access to navigable waters and the corresponding power of the federal government under the Commerce Clause to improve, clear, and extend waterways have led this Court to hold repeatedly that navigable waters and the private lands over which they flow are subject to a servitude for public navigation. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation * * *." *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865); *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 595 (1941).

Because all navigable waters and underlying lands are "subordinate to the public right of navigation," *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62 (1913), this Court has held that no compensation need be paid to affected landowners for economic losses resulting from exercise of the government's regulatory power over navigable waters. Thus, no compensation need be paid for the loss in water power due to government impairment of the flow to a power company, *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 76; nor for the loss in water power due to the government's raising of the high water mark so as to reduce the head, *United States* v. *Willow River Co.*, 324 U.S. 499 (1945); nor for the loss

of fishing and boating access to a navigable creek that is blocked as a result of federal improvement of another waterway, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); nor for the potential value of land as a port site when it is condemned for a lock and dam project, *United States* v. *Rands*, 389 U.S. 121, 123 (1967).

As petitioners note (Pet. 17-18), a 1930 opinion of the Attorney General of the United States did state that Congress could not take over "complete possession and control" of a "wholly artificial" canal without paying compensation. But the opinion also stated that one who makes improvements to navigable waterways "takes the chance that the United States may conclude to exercise its paramount authority under the Commerce Clause * * *," and that such improvements may be completely appropriated without compensation. 36 Op. Att'y Gen. 203, 213, 214 (1930). Kuapa Pond, of course, is not an artificial but a natural body of water (see Pet. App. 8a-9a). And whether or not the United States could appropriate the waterway to its exclusive use, all the United States has done by virtue of the court of appeals' decision here is prevent the obstruction of public navigation.[6]

---

[6] Petitioners do not question the authority of the United States to bring an enforcement action such as this, pursuant to Section 12 of the Rivers and Harbors Act of 1899 (33 U.S.C. 406), to prevent the obstruction of a navigable waterway in violation of Section 10 of that Act, 33 U.S.C. 403. Because this case arises in the context of such a federal en-

While the navigation servitude applies only to "navigable waters of the United States," Kuapa Pond—or Hawaii-Kai Marina—is today a navigable waterway. It is navigable in fact, ebbs and flows with the tides, is used for navigation, has been used by petitioners in commerce (Pet. App. 18a-19a), and forms a continuous highway of sea to Maunalua Bay and thence to the Pacific Ocean and to other states. It thus meets all the tests of a navigable waterway. See, *e.g.*, *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 454-456 (1851); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *Packer* v. *Bird*, 137 U.S. 661 (1891); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 407, 416 (1940). And

---

forcement proceeding, it does not present the question whether a member of the public could independently rely on Section 10 to obtain access to waters made private by state law. Compare *Vaughn* v. *Vermilion Corp.*, petition for writ of certiorari pending, No. 77-1819, with *Silver Springs Paradise Co.* v. *Ray*, 50 F.2d 356 (5th Cir. 1931), and *Cleveland & Pittsburgh R.R.* v. *Pittsburgh Coal Co.*, 317 Pa. 395, 398 (1935). See also *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 250-256 (1954) (congressional exercise of the navigation servitude must be explicit).

Although petitioners state that the Corps of Engineers was aware of their dredging and filling operations yet never required a permit or asserted regulatory authority until the early 1970's (Pet. 7), petitioners do not now contend that the United States is estopped to prevent obstructions to navigation in Kuapa Pond. The district court correctly rejected any defense based on acquiescence by the Corps (Pet. App. 33a). See *Louisville Bridge Co.* v. *United States*, 242 U.S. 409 (1917). Petitioners now appear to concede, moreover, that the Corps has jurisdiction to regulate their dredging and filling (Pet. 15).

although the navigation servitude does not extend above the high-water mark, *United States* v. *Rands*, *supra*, 389 U.S. at 123, in the present case the public right of access is not asserted above the high-water mark of the pond but only over the navigable portion.[7] In the absence of a federal permit allowing the exclusion, the public may no more be excluded from the waters of Kuapa Pond than from any other seacoast harbor.

2. Petitioners argue, however, that Kuapa Pond is not a "navigable water of the United States," and hence is not subject to the plenary federal power over such waters, because Hawaii property law and Section 95 of the Hawaiian Organic Act, ch. 339, 31 Stat. 160, allegedly recognize Hawaiian fishponds as private property from which the public may be excluded. The district court, while determining that the public would otherwise have a right of access to Kuapa Pond by virtue of the federal navigation servitude (Pet. App. 24a-25a), agreed with petitioners that the opposite conclusion followed from "the unique legal status of Hawaiian fishponds * * * as strictly private property * * *" under Hawaii law and the Hawaiian Organic Act (*ibid.*).[8]

---

[7] Activities above the high-water mark that affect the course, location, condition, or capacity of a navigable water are subject to regulation under 33 U.S.C. 401.

[8] Petitioners do not argue that the navigation servitude is confined to natural waterways. Compare *Vaughn* v. *Vermilion Corp.*, petition for certiorari pending, No. 77-1819. In any event, Kuapa Pond is a natural body of water. It probably met the legal tests for navigability prior to its development. See,

That conclusion is wrong. The navigation servitude may not be defeated by state law's recognition of title in a private owner. In the first place, there is no inconsistency in recognizing private title to a water bed and private riparian rights while also recognizing that such ownership is subject to certain public easements and servitudes. The navigation servitude does not determine title to the bed or even to the water itself, but simply modifies such title by impressing on it the public right of navigation. At all events, state law cannot erase the federal easement any more than state law can restrict the exercise of other federal authority over commerce. See *United States* v. *Twin City Power Co.*, 350 U.S. 222, 227 (1956); *United States* v. *Chandler-Dunbar*, 229 U.S. 53, 69 (1913); see also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 173-178 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824).

Petitioners argue that in Section 95 of the Hawaiian Organic Act, ch. 339, 31 Stat. 160, 48 U.S.C. 506, Congress itself recognized and adopted certain customs and laws of Hawaii that petitioners contend preclude a public right of access to fishponds. Section 95 provides:

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person

---

e.g., *The Montello*, 87 U.S. (20 Wall.) 430, 442-443 (1874); *United States* v. *Utah*, 283 U.S. 64, 76, 86-87 (1931); *United States* v. *Appalachian Power Co.*, *supra*, 311 U.S. at 407. It certainly meets those tests today and is still essentially a natural body of water.

> or persons are hereby repealed, and all fisheries in the seawaters of the Territory of Hawaii *not included in any fish pond or artificial inclosure* shall be free to all citizens of the United States * * *. [Emphasis added.]

Petitioners rely on the italicized phrase as demonstrating that Congress excluded Kuapa Pond from the federal servitude making the seawater fisheries of Hawaii "free to all citizens of the United States * * *" (Pet. 12-14). We submit, however, that far from establishing the privacy of petitioners' marina, Section 95 and the Hawaii law on which it was based confirm the correctness of the decision below.

Section 95 gathers meaning from history. In 1848, King Kamehameha III pronounced the Great Mahele, a national land distribution under which large land units (ahupuaa) were allotted to his chiefs (Pet. App. 3a-4a, 17a). An ahupuaa generally ran from the mountain to the sea and included any fishponds within its boundaries (*id.* at 17a). It afforded the chief and his people access to fisheries at the seaside as well as the products of the highlands, such as fuel, canoe timber, and mountain birds and game. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-241 (1879).

Fishing was a vital occupation for a chief and his people, and customs and laws regulated the allocation of fishing rights among the chief, the people, and the King. See *Carter* v. *Hawaii*, 14 Haw. 465, 470-473 (1902). Anyone was permitted (after 1839) to fish in the ocean outside the coral reefs (*id.* at 471), but

only the landlord and the tenants could fish inside the reef or in fishponds within the ahupuaa (*ibid.*). Fishponds were of three types: (a) loko wai—inland fresh-water ponds normally at an elevation higher than sea level; (b) loko kuapa—shallow ponds formed by building a stone wall into the sea to create an artificial enclosure; and (c) loko pu'u—shallow ponds formed by a natural sand beach between the pond and the sea (Tr. 65-66).[9]

Kuapa Pond, prior to its transformation into a marina and boating area, was essentially of the last type, though the use of a stone wall to reinforce its natural sand bar accounted for its name (Pet. App. 15a-16a & n.3; Tr. 67-69). In addition to the stone wall, sluice gates had been placed in two openings to the pond from Maunalua Bay (Pet. App. 15a-16a). Kuapa Pond was originally under the supervision of the high chief of the ahupuaa and his fishpond guardian (Kiai'i loko) and of the family members who worked the pond (haku'ohana) (Tr. 69). Fish were raised in the pond in two ways. First, the sluice gates allowed spawn to flow in and out of the pond but did not allow large fish to leave. Second, since mullet did not spawn in the fishpond, they were caught outside the pond and planted within it as seed (Tr. 70). Fish were harvested in the pond with the aid of shallow-draft canoes (Pet. App. 16a).

Fishponds thus contained cultivated crops, and it is understandable that Hawaii law recognized the

[9] "Tr." refers to the reporter's transcript of the proceedings in the district court on November 19, 1975.

exclusive right of the cultivators to reap their harvests by excluding the public from such ponds. For the same reason, it is understandable that Hawaii property law treated fishponds as improvements appurtenant to the land, as petitioners observe (Pet. 14). See *In re Kamakana*, 58 Haw. 632, 640 (1978); *Harris* v. *Carter*, 6 Haw. 195 (1877).

When Hawaii was annexed as a territory, Section 95 of the Hawaiian Organic Act, quoted at pages 12-13, *supra*, provided that all laws of the Republic of Hawaii conferring exclusive fishing rights were repealed and that all fisheries in the sea waters of Hawaii "not included in any fish pond or artificial inclosure" were thereafter free to all citizens of the United States. Section 95 thus entitled the public to fish in the sea waters inside the coral reefs, just as the public could already fish outside the reefs. But fishponds and artificial enclosures (loko pu'u and loko kuapa), though they contained sea waters, were excepted from public access.

Kuapa Pond today, however, is not a fishpond or an artificial enclosure any longer. It has been transformed into a marina that is an arm of the sea, and the very purpose of which is to provide access to the sea.[10] For several reasons, the exception provided by Section 95 no longer applies to such a body of water.

First, the intent of Congress in Section 95 was "to destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the

[10] As the district court noted (Pet. App. 20a), "the channel connecting the marina and the bay is unobstructed"—the opposite of a pond or enclosure.

people." *In re Fukunaga*, 16 Haw. 306, 308 (1904);[11] *State* v. *Hawaiian Dredging Co.*, 48 Haw. 152, 187 (1964). Congress intended to open all sea waters to the public with the limited exception of fishponds and other enclosed waters, since they were used for aquaculture. Once the cultivation of fish ceases and the enclosure is breached for connection to the sea, the reason for the exception vanishes and the reasons for the rule of universal access apply.

Second, "[t]he general purpose of [Section 95] and of the following sections, 96 and 97, [was] to put the fisheries of the Hawaiian Islands upon the same basis as those in the United States." H.R. Rep. No. 305, 56th Cong., 1st Sess. 24 (1900). This congressional statement (which is the only statement in the House or Senate Report regarding the relevant language) refutes the notion that Congress intended to treat Hawaiian fishery rights differently from fishery rights in the rest of the United States. It demonstrates an intention to establish in Hawaii the traditional public right of access to the navigable waters of the United States. Thus, once Kuapa Pond ceased to be used as a fishpond and was connected to the sea, it joined the system of navigable waters to which all the public have a right of access.

[11] In *Fukunaga* the landlord of a sea fishery contended that, although Section 95 allowed the public to fish sea fisheries, Section 95 did not repeal a Hawaiian law prohibiting the taking of a certain species designated by the landlord. The Supreme Court of Hawaii held that such a construction of Section 95 was "too narrow," and upheld the right of the public to fish for all species.

Third, insofar as Congress meant to adopt Hawaii law's definition of a fishpond, Hawaii property law itself seems to recognize an exclusive private right of fishery in fishponds only so long as they remain enclosed.[12] While Hawaii property law recognizes traditional fishponds as private property, the Hawaii decisions cited by petitioners (Pet. 14) do not hold or suggest that once a fishpond ceases to be used for aquaculture and is merged with the ocean, it still enjoys its exclusive status. The references to fishponds in those decisions apparently concerned actively farmed fishponds. Hawaii property law seems to hold that a pond remains private only so long as it remains completely enclosed. See *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915) ("[W]hen one captures fish in the public waters and confines them in a private pond, disconnected from the public waters, he acquires an absolute property in them * * *").[13] Indeed,

[12] We do not contend that Congress meant to incorporate the state law definition of a fishpond. We only submit that assuming *arguendo* that Congress meant to do so, Hawaii property law does not recognize as private property a fishpond transformed in the manner of Kuapa Pond.

[13] Of the Hawaii cases cited by petitioners (see Pet. 14), only three have any bearing on fishponds for our purposes. *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915), supports our view that the exclusive right to fish in a fishpond exists only so long as the pond is "disconnected from public waters." *In re Kamakana*, 58 Haw. 632 (1978), and *Harris* v. *Carter*, 6 Haw. 195 (1877), concern the extent to which apparently active fishponds are appurtenant to the land. Furthermore, the 1939 opinion of the Attorney General of Hawaii cited by the district court (Pet. App. 25a n.2) states that "[t]he status of ancient fish ponds fronting on the sea various ahupuaas and ilis have

Hawaii property law has traditionally recognized that "the harbors and channels of this country are government property." *Bishop* v. *Mahiko*, 35 Haw. 608, 647 (1940); *McBryde Sugar Co., Ltd.* v. *Robinson*, 54 Haw. 174, 187 (1973). *Carter* v. *Hawaii*, 14 Haw. 465, 470 (1902); *King* v. *Oahu Ry. & Land Co.*, 11 Haw. 717, 721 (1899).[14] Thus, to the extent that Congress may have intended to incorporate Hawaii property law into the use of the word "fishpond" in Section 95 of the Hawaiian Organic Act, that state law does not support the restrictive reading petitioners now urge.[15]

[sic] not been decided as yet by our highest court." [1933-1939] Hawaii Attorneys General Opinions No. 1689 at 461 (1939). The 1957 opinion of the Hawaii Attorney General, No. 57-159 (1957) (Pet. 8-9), does state that a breach in the sea wall of a fishpond would entitle vessels in distress to trespass in times of emergency, a point that need not be made if the waters are deemed public anyway. But neither opinion, and no previous case of which we are aware, addresses the property status of a fishpond that has been deliberately opened to the sea for navigation purposes, as in this case.

[14] It may also be relevant that under Hawaii law, a developer who sells lots subject to a plat showing them adjacent to proposed streets—or, we assume, waterways—dedicates the latter property to the public. *Hawaii* v. *Ala Moana Gardens*, 39 Haw. 517 (1952).

[15] There is no merit to petitioners' apparent alternative contention that the United States is bound to honor Hawaii's pre-annexation law regarding private rights to fishponds (Pet. 9). Petitioners recognize that their position depends on federal recognition of those rights at the time of annexation (Pet. 10).

In sum, the court of appeals correctly held that Kuapa Pond/Hawaii-Kai Marina is a navigable water of the United States and that the Secretary of the Army therefore has authority, under the Rivers and Harbors Act of 1899, to determine that petitioners' obstruction of public entry into the pond should not be permitted.

3. The issue presented by petitioners is unlikely to recur. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, makes it unlawful, among other things, "to alter or modify the course, location, condition, or capacity * * * of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." The conversion of Kuapa Pond into a harbor affording access to Maunalua Bay, by the dredging of a channel between the two, was an act altering or modifying the "course, location, condition, or capacity" of Maunalua Bay, which is without question a navigable water of the United States. Consequently, a permit under Section 10 of the Act was required although it was not in fact obtained, notwithstanding that petitioners did inform the Corps of Engineers of their plans.

It is the practice of the Corps of Engineers, when issuing a permit under Section 10 of the Rivers and Harbors Act, to include a provision that no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable

waters at or adjacent to the work or structure.[16] Consequently, had the Corps of Engineers exercised over petitioners' project the permit-granting authority that it possessed under Section 10, this case would not have arisen. The Ninth Circuit's decision has done no more than impose on the marina the same condition of accessibility to public navigation that would have been imposed by the Corps if the Corps had exercised its authority when it was apprised of petitioners' plan to construct the marina. Since the Corps proposes to avoid such oversights in the future, the issue presented here is unlikely to arise again in a similar context.[17] There is accordingly no need for review by this Court.

[16] From 1949 to 1969, this requirement was in 33 C.F.R. 209.130(f)(2)(v); from 1960 to 1977, in paragraph p of Appendix C to 33 C.F.R. 209.120, and since July 19, 1977, in paragraph II(b) of Appendix A to 33 C.F.R. 325 (42 Fed. Reg. 37157).

[17] Although petitioners accurately state that there are at least 142 fishponds in Hawaii (Pet. 5), petitioners offer no reason to believe that any of them have been or will be transformed into marinas without permits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

RAYMOND N. ZAGONE
KATHRYN A. OBERLY
MARTIN GREEN
Attorneys

JANUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285118 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ADDRESSING ARGUMENTS RAISED IN BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richard Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
HAMILTON, GIBSON, NICKELSEN,
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, Trustees of the Bernice P. Bishop Estate; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ADDRESSING ARGUMENTS RAISED IN BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

1. The Ninth Circuit Court of Appeals and the opposition brief filed by the government base their conclusions on the erroneous assumption that simply because a water body is deemed "navigable" for purposes of regulation it is automatically subject to the federal public navigation servitude as well.

Neither the Ninth Circuit opinion nor the opposition brief, however, are able to cite any direct authority for that assumption. A contrary conclusion was reached in 30 OP. ATT'Y. GEN. 203, 213-14 (1930), which opines that a wholly artificial body of water, even though subject to regulation, would not automatically be subject to a public navigation servitude. It logically follows that a natural body of water such as Kuapa Pond, which was clearly

nonnavigable and private in its natural condition and improved for navigation only by extraordinary private artificial means (Pet. App. 23a-24a, 31a-32a), would likewise not be subject to the servitude. *See also Vermilion Corporation* v. *Vaughn,* 356 So.2d 551 (La. App. 1978), *writ denied,* 357 So.2d 558 (La. 1978), *petition for cert. pending,* No. 77-1819. The District Court, the tribunal most familiar with the present problem, correctly held that no inconsistency results in the circumstances of this case from separating federal regulatory authority under the Rivers and Harbors Act from the power to impose a public navigation servitude (Pet. App. 31a-33a).

This Court has never addressed the issue presented by the Petition. It has never held that all waters navigable in fact are *a fortiori* open to public use. Congress passed the Rivers and Harbors Act to regulate for public safety and to protect commerce, not to afford public access to private waters at private expense.

The Brief of the United States in Opposition states: "[A]ll the United States has done by virtue of the court of appeals decision here is to prevent obstruction of public navigation." (Opp. Brief, 9.) That is precisely Petitioners' point—without foundation in law the government seeks to appropriate private property for public use under the guise of its regulatory authority. This use of regulatory authority has not been sanctioned by this Court, by the Constitution, or by Congress.

2. The Ninth Circuit Court of Appeals and the government persist in misapprehending Petitioners' reliance on *federal* rather than state recognition of private vested rights to Hawaiian fish ponds.

Petitioners have consistently maintained that *federal* recognition of pre-existing vested rights to fish ponds occurred upon annexation. Act of July 7, 1898, 30 Stat. 750-51. Federal recognition was affirmed by Congress when it passed the Organic Act, Section 95, codified at 48 U.S.C. § 506. Petitioners have never asserted or implied that state law takes precedence over federal authority, but do assert that federal recognition of private rights overrides the government's attempt to enforce an erroneous interpretation of its regulatory authority. This Court has itself recognized that grants of private rights by pre-existing sovereigns survive annexation by the United States and control over inconsistent state or federal law. *Knight* v. *United States Land Ass'n.,* 142 U.S. 161, 183-84 (1891); *San Francisco* v. *Le Roy,* 138 U.S. 656, 671-72 (1890). These cases are ignored by the Ninth Circuit opinion and the opposition brief.

The traditional private rights in fishponds, such as Kuapa Pond, remain today as *federally* recognized rights of property, which must be judicially protected. *Damon* v. *Hawaii,* 194 U.S. 154, 158 (1904).

Recent development work notwithstanding, Kuapa Pond remains in law a private water body; its essential feature of separation by barrier beach formation from the open sea persists. Nothing in the record or the law suggests that its historical, federally-recognized private status has ever been surrendered or abandoned. The government itself concedes the existence of exclusive private fishing rights.

The assertion of the government and Court of Appeals that, even under Hawaiian law, exclusive rights are recognized only so long as a fish pond continues to be used for traditional fish cultivation is without foundation. They erroneously cite *In re Kamakana,* 58 Haw. 632 (1978), as

"apparently" holding exclusive rights to exist only so long as a fish pond is actively farmed. The private right upheld in that case is *not* conditioned upon continued traditional use of the fish pond in question. They further dismiss the 1957 Opinion of the Hawaii Attorney General, No. 57-159 (1957). This opinion found that fish ponds are private, but may be subject to trespass by boats in emergency, and plainly contemplated their being altered, because in their natural state such trespass would not have been possible. *In re Fukunaga,* 16 Haw. 306 (1904), cited as authority for the proposition that Congress intended to destroy private rights to fisheries in the Organic Act, actually contains strong language to the contrary, emphatically affirming that rights vested upon annexation remain vested until destroyed by condemnation and payment for value. *Id.* at 308-09. This assertion was also expressly rejected by the District Court, which by virtue of its intimate acquaintance with the applicable legal principles was far better qualified than the Court of Appeals and the government to determine the issue. (Pet. App. 16a-17a, 25a-28a).

3. The government absurdly concludes that the problem will not recur, because the government will condition all permit granting from this date forward on the applicant's acceptance of the imposition of a public servitude. If a permit is required by the circumstances, nothing in their regulatory authority gives the Corps of Engineers authority to condition permit granting on the forfeiture of private rights.

The interrelationship between the regulatory authority of the Corps of Engineers and a public navigation servitude has never been decided, and the issue is likely to persist and be raised each time the government conditions permit granting on acceptance of a public servitude.

Further, there exists at least 142 fish ponds in Hawaii in various stages of repair ranging from nearly original condition to substantially modified. In all likelihood, the problem presented here will recur repeatedly until the Supreme Court decides the issue after full analysis.

Moreover, the general question of public access to private navigable in fact waters is by no means indigenous to Hawaii as the pending Petition in No. 77-1819, *Vaughn* v. *Vermilion Corporation,* itself evidences.

CONCLUSION

Unique questions of *federal law* are presented and require Supreme Court resolution to avoid recurring litigation and the trampling of private property rights. If the Ninth Circuit opinion is permitted to stand, the Corps of Engineers, ostensibly vested with regulatory authority only, becomes a vehicle for government taking of private property, circumventing the protections of property owners contained in eminent domain procedures.

Respectfully submitted,

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richard Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
HAMILTON, GIBSON, NICKELSEN,
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richards Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
ROBERT BRUCE GRAHAM, JR.
HAMILTON, GIBSON, NICKELSEN
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

INDEX

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

PAGE

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

Opinions Below

The opinion of the Court of Appeals (Pet. App. 1a-12a) is reported at 584 F.2d 378 (9th Cir. 1978). The opinion of the District Court (Pet. App. 13a-34a) is reported at 408 F. Supp. 42 (D. Haw. 1976).

Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1978. The petition for a writ of certiorari was granted on February 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether fish ponds in Hawaii are private real property.

2. Whether federal regulatory jurisdiction and the navigation servitude are distinct.

3. Whether the navigation servitude can apply to private nonnavigable waters rendered navigable-in-fact only by extraordinary private efforts.

4. Whether mandating public access to Kuapa Pond violates fifth amendment prohibitions against uncompensated takings.

Statement

Kuapa Pond is situated wholly on property owned in fee simple by the Bishop Estate, located within a suburban development on the Island of Oahu, State of Hawaii (R. 260, 261, 264; Pet. App. 14a).

Geologically, Kuapa Pond dates from prehistoric times. It apparently was created in the late Pleistocene Period, near the end of the ice ages, when the rising sea level caused the shoreline to retreat and partial erosion of adjacent headlands generated sediment which accreted to form a barrier beach. The result was a shallow lagoon separated from the open ocean by the barrier beach formation (Tr.* 9-10; Pet. App. 15a). The water within the lagoon was brackish, containing a balance of sea water and fresh water including runoff from the surrounding mountains, rainfall

* All transcript ("Tr.") references are to the transcript of the trial proceedings commencing on Nov. 19, 1975.

and water from natural springs (Tr. 14, 22, 24, 19; Pet. App. 15a). The barrier beach was permeable, permitting percolation of both fresh and sea water through it, and was periodically breached by the force of the sea or accumulated fresh water (Tr. 14, 22, 26; Pet. App. 15a).

Prior to recorded history, perhaps as early as A.D. 1350, the Hawaiians began to use the lagoon as a fish pond (Tr. 90). To do so, they reinforced the barrier beach with stone walls built on top of it (Tr. 78; Pet. App. 15a).

The Hawaiian term for such fish ponds is "Loko Kuapa" which is derived from the Hawaiian words *loko* (pond), *kua* (backbone) and *pa* (wall) (Tr. 65-67, 81-82). Kuapa Pond's name is also its generic classification, i.e., it is a fish pond enclosed by a reinforced barrier beach (Pet. App. 16a).

At two sites where the barrier beach separating the pond from the sea had been periodically breached, the Hawaiians constructed *makaha,* or sluice grates, which permitted water to flow in and out of the pond but stopped the larger fish (Tr. 70, 71). The *makaha* also permitted drainage of the pond and aided in a form of dredging accomplished by stirring up the mud bottom and using the circulation of fresh water to flush the pond (Tr. 72; Pet. App. 16a). Spawn were able to pass through the grates and in this manner the pond was seeded with fish (Tr. 70, 71).

Seeding was also accomplished by catching the *pua,* or mullet spawn, for which adajacent Maunalua Bay was famous, and placing them in the pond, which was necessary because mullet do not spawn in fish ponds (Tr. 70; Pet. App. 16a). The entire operation of a pond was akin to farming, and was supervised by the paramount chief, assisted by a designated fish pond guardian (Tr. 69). The

fish pond itself was thus an integral part of the Hawaiian feudal system (Pet. App. 16a).

Any discussion of the Hawaiian real property law must begin with its feudal past. Prior to the introduction of western concepts of kingship, government and real property, all property rights emanated from the highest ranking chief who ruled by right of conquest and appointed and removed lesser chiefs at will (Tr. 84; Pet. App. 16a).

The lands of Hawaii anciently were divided into vast tracts called *ahupua'a*. The size and shape of the *ahupua'as*, and of their subdivisions called *ilis*, varied greatly. Generally, they were economically self-sufficient units reaching from the uplands to the sea, affording their respective inhabitants the necessities of life, including fish, crops and forest products. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-42 (1879). Everything within the *ahupua'a* or an *ili* was governed by the appointed chief, or *konohiki*, who in turn was responsible to the paramount chief of a given district or island (Tr. 84).

The fish ponds within any given *ahupua'a* or *ili* were always considered part of the land rather than part of the sea (Tr. 83; Pet. App. 16a-17a), and belonged solely to the *konohiki*, or local chief (Tr. 83, 84; R. 265). They were closed to the commoners, or *hoa'aina*, and even to other chiefs (Tr. 84, 87).

Sea fisheries were appurtenant to the *ahupua'as* and *ilis*. These were a form of piscary right and were closed to all except the residents of the dominant *ahupua'a* or *ili*. All sea fisheries rights were subject to *kapu*, or taboo rights, of the *konohiki*. *Damon v. Territory of Hawaii*, 194 U.S. 154, 158 (1904).

The ancient system prevailed until the Great Mahele of 1848, promulgated by King Kamehameha III. The Great Mahele effected a division of the lands of the kingdom between the king and the high chiefs. Commoners did not participate. The result was the elimination of the ancient system of feudal tenure and the perpetuation of the ancient land divisions. The *konohikis* were awarded the right to obtain fee title to the *ahupua'as* and *ilis* they had formerly administered and enjoyed as vassals of the king (Pet. App. 3a-4a, 17a).

After the Great Mahele, the *konohikis* were obliged to obtain an award from the Board of Commissioners to Quiet Land Titles, commonly referred to as the "Land Commission," to establish the boundaries of the ancient *ahupua'as* and *ilis* awarded to them, and to obtain a Royal Patent by paying a commutation tax to the Hawaiian Government. The Great Mahele lasted for forty-one days, but the process of obtaining Land Commission Awards, Boundary Certificates and Royal Patents continued throughout the Nineteenth Century. *See Harris v. Carter*, 6 Haw. 195 (1877).

So massive a land reform required that the divisions be made by name only, without benefit of survey, and the ancient boundaries remained in force. To this day, Hawaiian property titles generally derive from the Great Mahele and are referenced to the ancient *ahupua'as* and *ilis*. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-41 (1879). As explained below, the award of an *ahupua'a* or an *ili* carried with it all of the land, including fish ponds, within the anciently established boundaries (Tr. 83-88).

Kuapa Pond is a portion of the Ili of Maunalua which was awarded to the Princess Victoria Kamamalu in the Great Mahele of 1848. Maunalua was one of several *apanas* or parcels subsequently confirmed in Kamamalu. All of

Hawaii-Kai today, including the marina within Kuapa Pond, is legally described as Apana 30, Land Commission Award 7713, Royal Patent 4475, to Victoria Kamamalu (R. 264).

The Ili of Maunalua eventually passed from Kamamalu through her relatives to the Princess Bernice Pauahi Bishop. Upon the death of Princess Pauahi in 1884, the property passed to her trustees whose successors administer it today as part of the Bernice Pauahi Bishop Estate (R. 264).

The Bishop Estate and its lessees have paid and continue to pay real property taxes on Kuapa Pond. Since at least 1903, the Bishop Estate has leased the pond to various individuals and the public has been consistently excluded from using the pond without proper authority from the owners or their lessees. Bishop Estate and its predecessors have always maintained Kuapa Pond as private property (R. 264-65).

Early in this century, Kalanianaole Highway was constructed across the ancient barrier beach. Coral fill was placed on top of the sand bar to provide a highway foundation (R. 266). Bridges were constructed over the waterways between the *makahas* (sluice grates) and the sea, but prior to 1961 Kuapa Pond itself was used exclusively as a fish pond (R. 266; Pet. App. 17a).

On April 27, 1961, Bishop Estate entered into a development agreement with Kaiser Aetna granting master development rights to a 6,000 acre area today known as Hawaii-Kai. An integral part of the development agreement was the right of Kaiser Aetna to lease the area known as Kuapa Pond and to provide improvements such as dredging, walls and bridges (R. 266).

A formal lease of Kuapa Pond to a Kaiser Aetna company was executed on October 17, 1967 (R. 260; Defendants' Exhibit 11). The lease was subject to an earlier declaration of protective provisions, dated July 24, 1962, which granted each lessee of a waterfront lot a nonexclusive easement to use the waters of Kuapa Pond (R. 260; Defendants' Exhibit 13). The declaration of protective provisions reserved to the lessor the right to adopt and enforce rules and regulations concerning the use of the pond and to impose reasonable assessments on every marina lot lessee to pay the expenses of its care, maintenance and operation.

Development work began in 1961 (R. 266). Lands were graded, the pond was dredged and filled, and roads and bridges were constructed so that by the time of the trial a marina-style residential community of approximately 22,000 persons surrounded Kuapa Pond (R. 266-67).

Although the Corps of Engineers was aware of the work in Kuapa Pond, it did not require permits until January 11, 1972 (Defendants' Exhibits 14, 15 and 36; Plaintiff's Exhibit 17). A Corps of Engineers permit was obtained by Kaiser Aetna during late 1966 or early 1967 for construction of the Hawaii-Kai Marina channel and a bridge over it. The permit was required because part of the channel excavation work was to be performed in Maunalua Bay. It was understood by the Corps of Engineers and Kaiser Aetna that the marina was private, and that no permits were necessary for work in Kuapa Pond (Defendants' Exhibits 15, 16 and 36).

Kuapa Pond now has an approximate average depth of six feet, and the main channel connecting it with Maunalua Bay, an approximate depth of eight feet (R. 255). Pond maintenance has been financed by an annual $72.00 fee which is paid by the approximately 1,500 marina lot lessees,

and by approximately 142 non-marina lot lessees for boating privileges (Pet. App. 19a-20a). These fees also pay for marina patrol boats which remove floating debris, enforce boating regulations and maintain the privacy and security of the pond (Defendants' Exhibit 37).

A marina has been constructed with berthing and fueling facilities for the pleasure boats which have been licensed to use Kuapa Pond (R. 266). Use by boats is limited by the six foot pond depth and the thirteen and one-half foot clearance limit of the highway bridge over the main channel to Maunalua Bay (Tr. 105). Although the marina does have three sixty-foot boat slips (R. 257), boats of that size are not able to navigate the pond.

Commercial use of the pond has never been permitted. A small vessel, the "Marina Queen," was used for approximately five years starting in 1967 to show developers, potential purchasers and school children the Hawaii-Kai development. It was also used for a brief period in 1973 to introduce Hawaii-Kai to Waikiki tourists, an activity which the District Court found to be *de minimis* (Pet. App. 29a). The "Marina Queen" has always been operated solely within the pond waters (R. 255-57).

Kuapa Pond is not a commercial harbor. It is a private recreational haven for sailing, boating, water skiing, crabbing, fishing and moorage of pleasure boats (Defendant's Exhibit 37).

Because Bishop Estate and Kaiser Aetna disputed the January 11, 1972 determination of navigability by the Army Corps of Engineers (Plaintiff's Exhibit 17), the Corps instituted suit on July 6, 1973 in the United States District Court for the District of Hawaii seeking a declaratory judgment that Kuapa Pond was subject to regulation under

Section 10 of the Rivers and Harbors Act, and an injunction preventing denial of public access to Kuapa Pond (R. 1-13).

After a nonjury trial in November 1975, the District Court rendered a written decision on February 6, 1976 (Pet. App. 13a-34a). It granted a declaratory judgment that Kuapa Pond was subject to Rivers and Harbors Act regulatory jurisdiction upon the basis that " . . . the marina is in fact used in interstate commerce both to raise revenue for Kaiser Aetna and to transport residents and nonresidents by waterway into and out of Maunalua Bay" (Pet. App. 29a-30a).

The District Court denied, however, the request for injunctive relief, concluding that the right of public use did not necessarily follow from the government's right to regulate. While it recognized the right of the public to pass over *naturally* navigable waters, the court held that there is no right of public access to the private waters of Kuapa Pond, and that its transformation into a marina created no public rights. The government could not appropriate those waters for public use without payment of just compensation (Pet. App. 31a-33a).

Both sides appealed from the adverse rulings against them to the United States Court of Appeals for the Ninth Circuit. On August 11, 1978, the Ninth Circuit issued an opinion affirming the District Court's finding of regulatory jurisdiction, but reversing its denial of injunctive relief (Pet. App. 1a-12a). It upheld regulatory authority upon the grounds that Kuapa Pond, as artificially improved, was capable of commercial use. As to public use, it held that Kuapa Pond lost its private fish pond characteristics upon transformation into a marina, and that the public was entitled to access because regulatory authority and the

navigation servitude cannot consistently be separated; thus no compensation was necessary.

This Court granted Kaiser Aetna's and Bishop Estate's petition for writ of certiorari on February 20, 1979.

Summary of Argument

I. Kuapa Pond is a unique Hawaiian form of private real property. From the earliest times, Hawaiian jurisprudence has recognized the right of owners to exclude all others, including the government, from privately owned fish ponds. In fact, it does not distinguish between fish ponds and fast land. There is nothing in Hawaiian law or practice which suggests any public right in fish ponds. Rather, since at least 1851, fish ponds have been specifically excepted from statutes opening the sea fisheries to public use.

Congress recognized the existence of private property rights in fish ponds in Section 95 of the Organic Act passed following annexation of the Hawaiian Islands by the United States. The Act specifically exempts fish ponds from free public access. Congress thereby confirmed well established traditional viewpoints.

The Supreme Court also recognized unusual private water property rights in *Damon v. Territory of Hawaii,* 194 U.S. 154, 158 (1904), wherein Justice Holmes remarked that the Court had no choice but to acknowledge and protect private rights sanctioned by legislation, "however anomalous [they are] . . . ."

The District Court concluded similarly. While its findings and conclusions of Hawaiian law have not been disputed, the Ninth Circuit skirted those findings by tacking on the right of public access to the federal regulatory authority.

Petitioners, as private owners and lessees of Kuapa Pond, are entitled to control access and to have this Court protect that right. The instruments of annexation so require. The prior decisions of this Court so require. Principles of international law so require. *Knight v. United Land Association,* 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy,* 138 U.S. 656, 670-72 (1891).

II. Although the District Court properly analyzed the scope of federal regulatory jurisdiction and the navigation servitude as separate questions (Pet. App. 21a), the Ninth Circuit, without citation of any supporting authority, held that the scope of federal regulatory jurisdiction over navigable waters and the right of public use under the navigation servitude "cannot consistently be separated" (Pet. App. 11a). Having affirmed the District Court's finding that regulatory jurisdiction existed under the Rivers and Harbors Act, the Ninth Circuit held that a noncompensable right of public use automatically followed.

Federal authority over navigable waters may vary in scope. Exercise of this power for different purposes has often been recognized to justify different results. The purposes of regulatory authority and the navigation servitude are different; their scopes are different.

The servitude is a more limited concept than full commerce clause regulatory power. Its fundamental purpose is to preserve public navigable waters for public use. Public navigable waters for purposes of the servitude, as defined by *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871), and embellished by *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-408 (1940), are those waters which in their original condition, or with *reasonable* improvements, are susceptible to use in interstate commerce. Nei-

ther fast lands nor nonnavigable waters have been subjected to the servitude. Its scope has been limited by its purpose.

The regulatory power of Congress under the commerce clause is far broader in scope. Commerce may be regulated wherever it goes, whether the highway on which it travels be water or land, natural or artificial. Jurisdiction under the Rivers and Harbors Act itself has been extended to all activities affecting the capacity of navigable waters, even if occurring on fast lands or nonnavigable waters. Today, regulatory authority is concerned as much with environmental protection as navigation.

Whatever coincidence there once may have been between regulatory power and the servitude no longer exists. The Ninth Circuit's equation of these distinct concepts was therefore entirely improper.

III. Kuapa Pond in its natural condition was a private nonnavigable water body isolated from the open ocean. It was never susceptible to or used in commerce. It was not public navigable waters by any standard.

Kuapa Pond was improved only by extraordinary private efforts for use by pleasure boats in conjunction with a surrounding residential development. No public funds were expended and none are intended to be paid for a right of public access. No objection to existing structures in the pond has been made nor is any comprehensive public project involved. What the government now seeks is free public access.

No public purpose underlying the navigation servitude justifies its application to privately improved nonnavigable waters. No national need to preserve such waters ever existed. Regulatory power suffices.

The boundary of the servitude must remain at the edge of naturally navigable waters. The servitude's rule of no compensability is a harsh concept as presently applied; no further extension is warranted—particularly when uncompensated appropriation of long-vested private rights and elimination of presently existing state control will result.

IV. Requiring public access to Kuapa Pond violates the Petitioners' constitutional rights to compensation. The District Court carefully and correctly analyzed the pond's status vis-a-vis principles of common law and Hawaiian property law, and concluded the pond is private property, never subject to an overriding easement in favor of public use. In recognizing that conversion to a marina did not alter its exclusive status, the District Court held that waters never subject to the servitude could not now be converted to public waters by invocation of a servitude, i.e., the government cannot take by means of an easement which it *never* had.

The question raised by the government's attempt to fabricate a servitude in the present case is novel. It is the first instance, of which Petitioners are aware, in which the Corps of Engineers has boldly sought to open a private water body to the public as an end unto itself. No federal project is advanced or abated, no goal in furtherance of navigation or environmental protection is to be achieved—the only goal is public access. To obtain access to such waters, the government should be required to follow established condemnation procedures with just compensation to Petitioners. The Corps of Engineers, however, seeks to avoid this burden by an inequitable and unconstitutional taking of Petitioners' property rights.

This taking by inverse condemnation will have serious consequences, causing material injury to Petitioners. These concerns do not reflect elitism, but a realistic appraisal of the hazards of uncontrolled access to an area of limited capacity.

Clearing the pond of debris, providing dredging and maintenance, and monitoring compliance with water safety rules is done at private expense. The Corps has no funds budgeted for those responsibilities.

Petitioners recognize the national need for some carefully defined federal power over water bodies traditionally considered to have been subject to a public right to way. However, to extend the navigation servitude to all waters subject to regulation makes little sense when compensation is required for takings of fast lands and air rights. The history of the servitude does not justify its expanded application in this case, especially considering that it has been characterized as derived from and narrower than the commerce clause. This noncompensable taking cannot be justified as incident to regulation; it ignores fifth amendment protections.

This entanglement of regulatory authority and the navigation servitude warrants judicial clarification in the context of their separate national purposes. A rational test would allow regulation, while permitting public exclusion from private waters which have been improved only by privately financed extraordinary means and were not navigable in their natural state pursuant to the *Appalachian* standard.

ARGUMENT

I.

Fishponds Are Private Real Property, Part of the Land and Not Part of the Sea.

A. *Unlike the Sea Fisheries, Fish Ponds Were Never Subject to Public Use.*

From the earliest practices of the native chiefs, through the complex statutory framework of the Nineteenth Century land reforms, and to the present day, Hawaiian jurisprudence has always respected fish ponds as the private real property of their owners and has protected the exclusive rights of those owners.

In ancient times, the fish pond was the property of the governing chief. He administered it through his subordinate chiefs and he alone was entitled to reap the benefit of the fish pond. Others, including other chiefs, were excluded unless invited (Tr. 83-85; R. 265; Pet. App. 16a).

Nineteenth Century land reforms abolished the ancient system of tenure, but the ancient land divisions were retained as the basic units of property title. The Great Mahele of 1848 was conducted solely by reference to the names of the ancient *ahupua'as* and *ilis* without benefit of survey. Although formal definition of boundaries was therefore left to another time, it was well established that a Mahele Award carried with it whatever was included in the tract from ancient times. *In re Boundaries of Pulehunui,* 4 Haw. 239, 240 (1879).

Nothing in the Mahele nor in the subsequent evolution of Hawaiian land law altered the private nature of fish ponds. There was never any suggestion that the many fish ponds

throughout the kingdom were open to public use or public navigation.

This was not the case with the sea fisheries,[1] and a comparison of the legal fate of the fisheries with that of the fish ponds reveals the uniquely private nature of the fish ponds as a species of real property legally equivalent to fast land.

As early as 1839 Kamehameha III opened certain of the sea fisheries of the people.[2] He did so by exercise of his ancient, pre-Mahele rights as king and lord paramount. *Damon v. Territory of Hawaii,* 194 U.S. 154, 158-59 (1904).

Following the Great Mahele, Kamehameha III opened all of the sea fisheries appurtenant to government lands to the public.[3] In so doing, he specifically excluded government fish ponds from the Act. Section 2 of the Act provides as follows:

> All fishing grounds appertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be, and are, hereby, forever, granted to the people for the free and equal use of all persons: Provided, however, that, for the protection of such fishing grounds, the minister of the interior may taboo the taking of fish thereon, at certain seasons of the year.

[1] The sea fisheries, a unique form of ocean piscary right, were appurtenances of the *ahupua'as,* and the right to fish in them was limited to the tenants of dominant *ahupua'a. See Damon v. Terr. of Hawaii,* 194 U.S. 154, 158 (1904); *Haalelea v. Montgomery,* 2 Haw. 62 (1858).

[2] Enactment of His Majesty Kamehameha III of June 7, 1839 (Ch. 3, Laws of 1839).

[3] Act of May 15, 1851. Codified in Hawaiian Civil Code of 1859, Section 384 (Defendants' Exhibit 6).

The Act remains in force today as Section 188-1, Hawaii Revised Statutes (1976).

Similarly, Kamehameha III acted to restrict *konohiki* rights in the sea fisheries appurtenant to private lands by regulating their power of taboo, and by forbidding certain practices which frustrated use of the sea fisheries by the people resident in those privately owned *ahupua'as.*

The various acts were eventually codified and were in effect at the time of the annexation of Hawaii to the United States in 1898. Sections of these acts are still in force as portions of Chapter 188, Hawaii Revised Statutes (1976).[4]

Conversely, no statute of the Hawaiian Government ever purported to open the fish ponds to the public, or to regulate the *konohikis'* use of them. Instead, numerous statutes concerning fish and fisheries specifically exempted fish ponds and their owners from compliance.[5]

B. *Hawaiian Jurisprudence Has Uniformly Treated Fish Ponds as Private Real Property.*

Ironically, it is precisely because private ownership of fish ponds was such a fundamental concept of Hawaiian law that there are no statutes or case authorities which specifically state the proposition. As the District Court cogently observed, private ownership was so commonly accepted that the issue was not raised, and: "Dictum, under these facts, enhances rather than detracts from the strength of the legal precedents" (Pet. App. 25a).

[4] These statutes were codified in Hawaiian Civil Code of 1859 as Sections 387-392 and 394, and today appear in Sections 188-3 through 188-10, Hawaii Revised Statutes (1976).

[5] *See generally* Chapter 188, Hawaii Revised Statutes (1976), concerning fishing rights and regulations, which codifies earlier enactments.

The treatment of fish ponds as the legal equivalent of fast land is evident in the work of three Hawaiian tribunals: The Land Commission, the Boundary Commission and the Hawaiian Supreme Court.

The Land Commission. The Land Commission was created under Part I, Ch. VII, Article IV, of the Act to Organize the Executive Departments of the Hawaiian Islands, adopted April 27, 1846, and was charged with ". . . the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any *landed property* acquired anterior to the passage of this Act, . . ." (Emphasis added.) The Act repeatedly stated that the purpose of the Land Commission was to resolve "claims to land," and during its term the Land Commission consistently refused to examine title to the sea fisheries on the ground that its jurisdiction was limited to land titles. *Carter v. Territory of Hawaii,* 200 U.S. 255, 257 (1906); *State v. Hawaiian Dredging Co.,* 48 Haw. 152, 173, 397 P.2d 593, 606 (1964).

When the Land Commission was dissolved as of March 1855 by the Act of July 20, 1854,[6] Section 3 of the Act stated the legal effect of the Commission's work:

> Any award of the Land Commission not appealed from . . . shall furnish as good and sufficient a ground upon which to maintain an action for trespass, ejectment or other real action, against any person or persons whatsoever, as if the claimant, his heirs or assigns, had received a Royal Patent for the same, . . .

Given the refusal of the Land Commission to deal with anything but land and the language of the governing Acts,

[6] Laws of 1854, p. 21; Civil Code p. 415.

it is significant that the Land Commission routinely awarded title to fish ponds, including Kuapa Pond, which is part of Land Commission Award 7713.

This fact led the Hawaii Attorney General to conclude that "those dealing with land in the early days regarded fish ponds as part of the land they fronted." HAW. OP. ATT'Y. GEN. 1689, at 460, Feb. 2, 1939 (Defendants' Exhibit 8).

The Boundary Commission. The Boundary Commission, created by the Act of August 23, 1862 to settle the boundaries of the ancient *ahupua'as* and *ilis,* which had been awarded by name only, was similarly limited to adjudicating real property disputes. Laws of 1862, p. 27. It was without jurisdiction to settle the boundaries of the sea fisheries. *Bishop v. Mahiko,* 35 Haw. 608, 658 (1940). Nevertheless, the Boundary Commission routinely included fish ponds as part of the land area of the *ahupua'a* or *ili* to which it belonged. *In re Application of Kamakana,* 58 Haw. 632, 638-41, 574 P.2d 1346, 1349-51 (1978); HAW. OP. ATT'Y. GEN. 1689, *supra,* at 459.

Thus, on June 13, 1884 when the Commissioner of Boundaries determined the boundaries of the Ili of Maunalua, he defined the seaward boundary by reference to the wall of the fish pond, clearly including the body of Kuapa Pond within the land of Maunalua (Defendants' Exhibit 4).

The Hawaii Attorney General concluded that the Boundary Commission included fish ponds within the land "because *kamaaina* testimony[7] regarded the pond as part of the

[7] "Kamaaina testimony" refers to the testimony of persons familiar from childhood with any locality. *In re Application of Ashford,* 50 Haw. 314, 315, 440 P.2d 76, 77 (1968); *In re Boundaries of Pulehunui,* 4 Haw. 239, 245 (1879).

land and not the sea." HAW. OP. ATT'Y. GEN. 1689, *supra,* at 459.

The Hawaii Supreme Court. Hawaiian case law also confirms that fish ponds are a form of real property and pass with the *ahupua'a* or *ili* in which they are located. They pass not as mere appurtenances, but as intrinsically valuable real property. Thus, in *Harris v. Carter,* 6 Haw. 195, 197 (1877), the court said:

> . . . If a man sells his house-lot, the conveyance will be held to include the fountain or the garden which is in the house-lot.
>
> So a grant of an Ahupuaa will include the grantor's fish ponds or kalo [taro] patches lying with the Ahupuaa.

Another early Hawaiian decision illustrates this common usage. *Haalelea v. Montgomery,* 2 Haw. 62, 63-64 (1858), involved a warranty deed given by High Chief Kekuaonohi. The deed's description fixed the seaward property boundary at the outer wall of three fish ponds. The grantee's right to sea fisheries was challenged, but not their title to the fish pond.

Similarly, in *In re Boundaries of Pulehunui,* 4 Haw. 239 (1879), the court affirmed the decision of the Boundary Commission after reviewing the testimony received by the Commissioners. All of the witnesses had assigned a large fish pond to one *ahupua'a* or the other. No one suggested that it was common property or part of the sea.

In another pre-annexation decision, *Kapea v. Moehonua,* 6 Haw. 49 (1871), the defendant claimed to have leased a fish pond to plaintiff's decedent. Mingling references to fish ponds, houselots and taro patches and making no distinction

between them, the Hawaii court even adjudicated the fish pond rental.

A subsequent case establishes that the sale or lease of fish pond is a transfer of real property and not merely a license to fish. In *Murphy v. Hitchcock,* 22 Haw. 665 (1915), the Hawaii court held that the purchaser of a fish pond lease at a sheriff's sale acquired an estate in realty, not the school of fish within the pond. The court carefully distinguished fisheries from fish ponds, characterizing fisheries as easements or appurtenances to land, whereas a leasehold interest in a fish pond "is not a privilege of fishing or taking fish from a pond . . . but an estate for years in the realty, . . ." 22 Haw. at 669-670.

More recently, in *Palama v. Sheehan,* 50 Haw. 298, 440 P.2d 95 (1968), the court reviewed an action to quiet title to Nomilo Pond on the Island of Kauai. The court's decision treats the pond as it would any other form of real property.

Two recent Hawaii Supreme Court decisions are worthy of particular note. In *State v. Hawaiian Dredging Co.,* 48 Haw. 152, 397 P.2d 593 (1964), and *In re Application of Kamakana,* 58 Haw. 632, 574 P.2d 1346 (1978), the court gave special attention to the codes and usages of the Hawaiian monarchy. Its decisions are therefore useful in understanding the nature of pre-annexation property rights.

State v. Hawaiian Dredging Co., 48 Haw. 152, 397 P.2d 593 (1964), concerned a Land Commission Award involving the Ili of Mokauea. The Ili consisted of *kula* (dry) land, fish ponds and a sea fishery. 48 Haw. at 162-63, 397 P.2d at 600. The private owners maintained that the Land Commission had awarded their predecessors fee simple title to all three areas. The State contended that only the area

inside the fish pond walls had been conveyed and " . . . that title to the sea bottom *makai* [seaward] of the fish pond remained in the Hawaiian government, . . . " Relying on the fact that the Commission "would not award [fisheries] as it did land," 48 Haw. at 174, 397 P.2d at 606, and other evidence, the court ruled the award did not include the sea fishery. Significantly, no one disputed the landowners' title to the fish ponds.[8]

In re Application of Kamakana, 58 Haw. 632, 574 P.2d 1346 (1978), was an appeal from a Land Court decree granting the applicant Torrens System title to Kanoa fish pond on the Island of Molokai. The fish pond was a *loko kuapa,* and extended into the sea. One contention of the State of Hawaii was that the pond was in the public domain, apparently because of its dilapidated condition.

In its discussion of the development of Hawaiian land titles, the court recognized that a grant of an *ahupua'a* included all within it and concluded that Kanoa Pond was included in the award. On that basis, and upon a finding that the State had not adversely possessed Kanoa Pond, the Hawaii Supreme Court affirmed the Land Court's decree registering Kamakana's title to Kanoa Pond. The language of the decision makes no distinction between fish ponds and other real property and leaves no room to doubt that the Hawaii Supreme Court today is of the same mind as its predecessor courts: A fish pond is a form of private real property from which the true owner is entitled to exclude all others, even if it is a dilapidated condition exposed to the sea and no longer used as a fish pond.[9]

[8] The court consistently used the term "land" to include both the *kula* land and the fish ponds. See, in particular, the discussion at 48 Haw. at 180, 397 P.2d at 609.

[9] Although the reported facts are not precise, the opinion does recite that the State of Hawaii contended that Kanoa Pond was no longer in existence at the time of the Land Commission Award covering it. The opinion also recites that even then (1854) it was no longer in use as a fish pond and that when conveyed in 1920, Kanoa Pond was described by reference to the line of the old seawall which *formerly* enclosed it. 58 Haw. at 634-35, 574 P.2d at 1347-48. The unmistakable inference is that in *Kamakana* the Hawaii Court confirmed Land Court (Torrens System) title to a fish pond, despite at least partial destruction of its seawall, and the fact that it was no longer used as a fish pond.

The holding in *Kamakana* is consistent with an earlier Hawaii Attorney General's Opinion. In that opinion, Attorney General Herbert Y. C. Choy concluded that where at one time a fish pond wall had enclosed a portion of the sea, the resulting fish pond, as well as the dry land conveyed with it, "became private property" upon conveyance by the government, and did not lose that status "by reason of the deterioration of the sea wall." He acknowledged, however, that in times of emergency "the public may enter that area [fish pond] and even beach boats" as the law permits a person to trespass on the property of another to save himself or his property. HAW. OP. ATT'Y. GEN. 57-159, Dec. 12, 1957 (Defendants' Exhibit 9).

The Hawaiian concept of fish ponds as part and parcel of the land has its origins in the ancient past, but the historic fact is indisputable. It is apparent in the decisions, methods and testimony of Hawaii's kings, justices, attorneys general, land commissioner, engineers and surveyors recorded for well over 125 years. Their uniform voice cannot be ignored or cast aside. Fish ponds are private real property from which the true owner may exclude all others, even if no longer used as fish ponds in the traditional sense and even if open to the sea.

C. *Congress Recognized the Existence of Unique Private Property Rights in Hawaiian Fish Ponds.*

Following annexation and pursuant to the Joint Resolution of Congress, a commission of five individuals was appointed to draft a plan of government for Hawaii. Since Hawaii was already a self-governing nation, it was intended that its municipal legislation remain in force, with modifications consistent with its new status. This intention was expressed in the Joint Resolution,[10] in the Commission's report to Congress[11] and in the resulting Organic Act.[12] The Commission drew heavily on existing Hawaiian statutes, copying some of them verbatim, or with stylistic changes only.

Walter F. Frear, Associate Justice of the Hawaiian Supreme Court, chaired the Commission's Committee on Fisheries which rendered a report on September 7, 1898.[13] Justice Frear's report carefully distinguished the fisheries from the fish ponds:

> In shoal waters along the shores there are many fish ponds, made artificially by the construction of stone walls of semicircular form with the shore line as a diameter, and with small openings through the wall for the flow of the tide. These are found on Government lands as well as private lands.

[10] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, the "Newlands Resolution," Resolution No. 55, 30 Stat. 750-51, July 7, 1898.

[11] Report of the Hawaiian Commission, S. Doc. No. 16, 55th Cong., 3rd Sess., Dec. 6, 1898.

[12] The Hawaiian Organic Act, Section 6, codified as 48 U.S.C. § 496.

[13] Report of the Committee Fisheries, Sept. 7, 1898, appended to the Report of the Hawaiian Commission, n. 11, *supra*, at pp. 93-95.

He also noted that under existing law:

> All fishing grounds appertaining to government lands or otherwise belonging to the government, excepting fish ponds, are free for all persons. . . . The fish ponds owned by the government are leased to private persons. . . .

Justice Frear suggested that the Committee on Public Lands consider the future disposition of government owned fish ponds and noted that privately owned fish ponds were already being leased from their owners by the Chinese and Japanese residents of Hawaii who had succeeded the Hawaiians in the fishing industry.

Justice Frear's report is persuasive of the unique nature of Hawaii's fish ponds, and evidences his familiarity with Hawaiian usage. Significantly, he recognized fish ponds as part of the land, subject to lease and private in nature, whereas fisheries were only appurtenant rights, subject to public navigation.

The Hawaiian Commission's draft Organic Act contained three sections relating to the sea fisheries and was introduced in both the House and Senate by Commissioners who were members of those bodies.[14] The language of what became Section 95 of the Hawaiian Organic Act (Pet. 3), now codified as 48 U.S.C. § 506, was not altered by Congress, becoming law April 30, 1900. That section provides in full as follows:

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters

[14] S. B. 222, Dec. 6, 1899, and H. R. 2972, Dec. 8, 1899, 56th Cong., 1st Sess.

> of the Territory of Hawaii *not included in any fish pond or artificial inclosure* shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided. (Emphasis added.)

It is at once apparent that Section 95 has its origins in the municipal legislation of Hawaii discussed by Justice Frear, and is a lineal descendant of the Act of May 15, 1851 set forth above (Defendants' Exhibit 6). While those sea fisheries not subject to vested rights were open to the public, fish ponds remained private, as they always had been; such was the municipal law of Hawaii and such was the intention of the men who drafted Section 95.[15]

When Section 95 of the Organic Act is considered in conjunction with then existing Hawaiian statutes and in the light of Justice Frear's report, it is apparent that the Organic Act wrought no change in the status of fish ponds. If anything, the existing Hawaiian law protecting private rights in fish ponds was expanded by the Organic Act to include "artificial enclosures." It is beyond doubt that despite the change in sovereignty, Kuapa Pond was after annexation the same private real property it always had been: "the legal equivalent of fast land." As such, it is just as deserving of protection as any other vested property right more familiar to Anglo-American law.

[15] The language of Section 95 of the Organic Act is duplicated in Article X, Section 3, of the Hawaii State Constitution (Pet. 4). Significantly, Section 96 of the Organic Act, now codified as 48 U.S.C. § 507, provided for the condemnation of fisheries by the government with payment of "just compensation" to the owner.

D. *As Private Real Property, Fish Ponds Are Entitled to Protection by This Court.*

This Court has held that unique Hawaiian property rights are entitled to protection. In *Damon v. Territory of Hawaii*, 194 U.S. 154, 158 (1904), a case instituted by the Bishop Estate to establish that Estate's right to a sea fishery, Mr. Justice Holmes concluded:

> A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right. . . . (Citation omitted.)

Accord, Carter v. Territory of Hawaii, 200 U.S. 255 (1906).

The words of Justice Holmes are compelling. Although they refer to the sea fisheries, they are equally applicable to fish ponds. Where, as here under the Hawaiian kingdom, property rights have been established by a government prior to annexation of the lands, those private property rights survive if they are recognized in and by the instruments of annexation.

This was the legal conclusion of the District Judge below (Pet. App. 25a-28a) which was summarily rejected by the Ninth Circuit (Pet. App. 9a-11a). The Circuit Court disregarded the fact that annexation did not abolish Hawaiian

law, that it was specifically determined that the municipal legislation of Hawaii would remain in effect, and that the framers of the Organic Act reserved for fish ponds the same protection they had always enjoyed under Hawaiian law.

The United States cannot now be heard, three quarters of a century later, to demand a renegotiation of the instruments of annexation. It is bound to protect all property rights in Hawaii emanating from the Hawaiian government prior to annexation. *Knight v. United Land Association,* 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy,* 138 U.S. 656, 670-72 (1891). Indeed, as this Court observed in *Knight,* irrespective of annexation agreements, principles of international law would compel the same result (142 U.S. at 173-84).

II.

Federal Regulatory Jurisdiction and Navigational Servitude Are Distinct.

A. *The Circuit Court Incorrectly Held That Federal Regulation and the Right of Public Access Cannot Consistently Be Separated.*

The Ninth Circuit had before it for review two separate legal issues: federal regulatory jurisdiction and the right of public access. Although the District Court had properly analyzed these questions separately, the Circuit Court deemed them incapable of separation.

Having upheld the District Court's determination that regulatory jurisdiction existed,[16] the Circuit Court concluded that the public access question had, in effect, already been answered:

> [I]n our judgment, federal regulatory authority over navigable waters (which the district court recognized to exist) and the right of public use *cannot consistently be separated.* It is the public right of navigational use that renders regulatory control necessary in the public interest. (Emphasis added.)

(Pet. App. 11a).

The Court of Appeals took a familiar concept, *i.e.,* all public navigable waters are subject to federal regulation, and applied it in reverse, concluding that waters subject to federal regulation are public waters subject to the federal navigation servitude. No opinion of this Court so holds, the Ninth Circuit failed to cite authority to support its conclusion[17] and none exists so far as Petitioners are aware. The question is a novel one with enormous implications.

If all waters subject to regulation are thereby burdened by the navigation servitude, long-settled private rights in small water bodies will be abrogated without compensation.

---

[16] The Ninth Circuit's holding on regulatory jurisdiction was premised solely upon Kuapa Pond's capability, as artificially improved, for use by interstate commerce (Pet. App. 5a-9a). The District Court premised its regulatory holding on the presence of interstate commerce in fact (Pet. App. 28a-31a). Neither court decided the government's alternative contention that tidal action by itself was sufficient to confer regulatory jurisdiction. The District Court reasoned that the unique property rights in fish ponds precluded such a holding (Pet. App. 24a-25a). The Ninth Circuit accepted *arguendo* the contention that the ebb and flow test could not render navigable a separate and distinct nonnavigable water body such as Kuapa Pond (Pet. App. 5a, n. 2).

[17] The Ninth Circuit cited *United States v. Appalachian Elec. Power Co.,* 311 U.S. 377 (1940); *Weiszmann v. Dist. Eng, United States Army Corps of Eng's,* 526 F.2d 1302 (5th Cir. 1976); and *United States v. Stoeco Homes, Inc.,* 498 F.2d 597 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975). These cases deal solely with commerce clause regulatory power, and do not involve or discuss any public access question.

This prospect is both remarkable and alarming. While the public interest may require extensive federal regulation to serve contemporary conflicting needs, there is no public need to go further and expropriate, on the pretext of regulatory authority, private property for public use. The purposes of regulation can be wholly served without transforming private waters into public waters.

B. *Federal Power Over Navigable Waters Has Many Legally Distinct Applications.*

The District Court properly recognized that "[t]he term 'navigability' has many legally distinct applications" (Pet. App. 21a). A water body may or may not be "navigable" depending on the purpose for which the federal power is exercised.

The question of federal power arises in a variety of contexts. The District Court noted title controversies, admiralty jurisdiction, commerce clause regulation and public access under the navigation servitude. Others include exercise of war powers, fulfillment of treaty obligations, assertion of property clause powers and pursuits on behalf of the general welfare. The scope of the federal power is not necessarily the same in each context. *See generally* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters,* 5 LAND & WATER L. REV. 391, 401-32 (1970).

For example, title to lands underlying navigable waters vested in the original colonies after the Revolution and in the new states upon admission. *Martin v. Waddell's Lessee,* 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagen,* 44 U.S. (3 How.) 212, 228-29 (1845). For title purposes, navigability is determined as of statehood and without regard to the presence or absence of interstate commerce. *See*

United States v. Oregon, 295 U.S. 1, 14 (1935); *United States v. Utah,* 283 U.S. 64, 75 (1931). Waters navigable for title purposes are not necessarily navigable for other purposes. There is thus nothing inconsistent between this Court's holding that the Great Salt Lake was navigable for title purposes, in *Utah v. United States,* 403 U.S. 9 (1971), and the holding of the Tenth Circuit that the same lake was not navigable for Rivers and Harbors Acts regulatory purposes, in *Hardy Salt Co. v. Southern Pacific Transportation Co.,* 501 F.2d 1156, 1165-69 (10th Cir.), *cert. denied,* 419 U.S. 1033 (1974).

Further, admiralty and maritime jurisdiction reflect the needs of the nation's shipping industry, applying even to a wholly artificial canal dug through fast lands. *E.g., Ex parte Boyer,* 109 U.S. 629 (1884). Yet, this Court has recently declined maritime jurisdiction over a crash of an airplane in the navigable waters of Lake Erie on a domestic flight on the ground that the alleged wrong did not bear "a significant relationship to traditional maritime activity." *Executive Jet Aviation v. Cleveland,* 409 U.S. 249 (1972). Waters subject to admiralty jurisdiction may not be navigable for other purposes. In *Adams v. Montana Power Co.,* 528 F.2d 437 (9th Cir. 1975), the Ninth Circuit concluded that although a dam-obstructed portion of the Missouri River might be navigable for purposes of commerce clause regulation, it was not navigable for admiralty purposes since its waters were no longer used by commercial vessels.

These examples demonstrate that the purpose behind the exercise of federal power is of paramount importance and deserving of careful analysis. Questions of regulatory jurisdiction and public access constitute no exception.

C. *The Federal Navigation Servitude Is More Limited in Purpose, Justification and Scope Than Federal Regulatory Jurisdiction.*

The navigation servitude and federal regulatory jurisdiction serve distinct national objectives. The servitude, while derived from the commerce clause, is narrower in scope; its purpose being to preserve the nation's public navigable waterways against private obstructions. Regulatory authority, on the other hand, is as broad as the full power of Congress under the commerce clause; its exercise is not limited to public navigable waters or to waters at all. Initially, these powers may have been coincidental in scope; today, however, regulatory power far exceeds the rational limits of the navigation servitude.

1. The fundamental purpose of the navigation servitude is to preserve public navigable water bodies for public use.

When Congress imposes the servitude to protect the public's right of way over public navigable waterways, it is beholden to no one:

> This navigational servitude—sometimes referred to as a "dominant servitude," . . . or a "superior navigation easement," . . .—is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." . . . The power "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." . . . (Citations omitted.)

United States v. Virginia Electric and Power Co., 365 U.S. 624, 627-28 (1961).

The burden of the servitude can be extraordinary, because no compensation is necessary when Congress is deemed to be exercising a paramount power to which navigable waters and underlying lands have always been subject. *E.g., United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U.S. 592, 596-97 (1941).[18] Unless this Court limits the servitude to its original purpose, namely, to insure unhindered right of way to protect the free flow of commerce, significant abuse of private rights will occur.

Although the roots of the servitude may be traced to England, where all lands under tidal waters were held in royal trust for the protection of public rights of navigation and fishery, the American servitude developed its own distinctive character. *See Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410-14 (1842).

Upon the Revolution, the people of the original states became sovereign and vested with absolute title to the navigable waters and soils underlying them, subject only to rights surrendered to the federal government. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410-11 (1842). New states acquired upon admission "on an equal footing" the same sovereign powers. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). *See also Shively v. Bowlby*, 152 U.S. 1, 14-15 (1894).

The dominant power over navigation and navigable waters was relinquished under the Constitution to Congress pursuant to its power to regulate "commerce"[19] which, ex-

---

[18] Full discussion of the rule of "noncompensability" and its current status is contained in Part IV of this Brief.

[19] U.S. CONST., art. I, § 8, cl. 3: "The Congress shall have Power . . . [t]o regulate Commerce with Foreign Nations and among the several States, and with the Indian Tribes;"

plained Chief Justice Marshall in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 190 (1824), includes "navigation." In order to prevent obstructions to public navigation, all "navigable waters" were considered "the public property of the nation." *See Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 724-25 (1866).

Classification of waters which were "navigable" and "public" as opposed to "nonnavigable" and "private" remained for resolution. In this process, differences between English and American geography proved a major factor.

In England, the tide marked the limits of public waters both legally and practically. Tidal and navigable waters were synonymous, for the tide reached virtually all of England's navigable streams. Much the same situation existed initially in the original colonies, so that early cases understandably employed the English ebb and flow test.

With territorial expansion the ebb and flow test ceased to be workable. Great inland lakes and rivers proved as navigable and commercially useful as the oceans. The arbitrary tidal versus nontidal dichotomy of the English and early American courts was soon abandoned.

Maritime law pioneered the way. In *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1851), this Court upheld admiralty jurisdiction over the Great Lakes and overruled its prior opinion in *The Steam-Boat Thomas Jefferson,* 23 U.S. (10 Wheat.) 428 (1825) (no admiralty jurisdiction on the Mississippi River). Chief Justice Taney traced the history of the ebb and flow test and rejected it as unfit for this country, where its application would be arbitrary, and require drawing an artificial line across the Mississippi at an uncertain point where the tide ceased its influence. 53 U.S. at 456-57. Jurisdiction was premised

". . . upon the navigable character of the water, and not upon the ebb and flow of the tide." *Id.* at 457.

Twenty years later the same test was adopted for commerce clause purposes in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). This Court held that ". . . the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all as to the navigability of waters." Under the navigability-in-fact test, those waters are navigable waters which ". . . are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.*

The navigability-in-fact test gave the government jurisdiction over all waters naturally capable of use in interstate commerce. It avoided drawing artificial boundaries across inland waters. It did not include small tidal water bodies not capable of use in interstate commerce.[20] The test served well the nation's expanding commercial needs by preserving major inland waters for public use, as this Court consistently recognized. *E.g., Barney v. Keokuk,* 94 U.S. (4 Otto) 324, 338 (1876) ("the great passageways of commerce and navigation"); *Escanaba Co. v. Chicago,* 107 U.S. 678, 682 (1882) (noting that inland waters in this country could be navigated for more than a thousand miles above the tide); and *Packer v. Bird,* 137 U.S. 661, 667 (1891) ("the susceptibility to use as highways of commerce . . . gives sanction to the public right of control . . . ").

---

[20] Although *The Daniel Ball* involved an inland river and not a tidal water body, its rationale is equally applicable to tidal waters. It would be as arbitrary to subject a tidal creek with no potential commercial capability to the servitude as to exclude control of an inland river above the point of ebb and flow.

The public servitude was properly defined by the public commercial need.

The Great Lakes, the Mississippi River and other waters useful for commerce in their natural condition were held to be public navigable waters. But, shallow waterways not useful for commerce were held to be nonnavigable, such as the crevasse known as Red Pass in *Leovy v. United States,* 177 U.S. 621 (1900), and the upper reaches of the Rio Grande River in *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690 (1899). Navigability-in-fact thus marked the border between "public" waters subject to the federal servitude and other waters exempt from its burden.

Navigable waters have continued to be gauged by their susceptibility to commerce in their natural condition, although it is now recognized that obstructions capable of being overcome by reasonable efforts do not prevent a finding of navigability. *E.g., The Montello,* 87 U.S. (20 Wall.) 430 (1874) (rapids and bars capable of being overcome by artificial improvements); *Economy Light & Power Co. v. United States,* 256 U.S. 113, 123 (1921) (a river once navigable "is within the power of Congress to preserve for purposes of future transportation," even though navigation is not presently possible due to artificial obstructions); *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940) (a water body is navigable if it can be made useful for interstate commerce by means of "reasonable improvements," balanced in terms of "cost and need").

This Court has not extended the limits of the navigation servitude beyond the facts of *Appalachian.* Fast lands are not subject to the servitude. *E.g., United States v. Virginia Electric and Power Co.,* 365 U.S. 624, 627-29

(1961); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 804-08 (1950); and *Pumpelly v. Green Bay Co.,* 80 U.S. (13 Wall.) 166, 177-81 (1871). Nor are nonnavigable waters. In *United States v. Cress,* 243 U.S. 316, 320-27 (1917), this Court held that the navigation servitude does not extend to nonnavigable tributaries of navigable streams and allowed compensation for destruction of a ford and loss of water power resulting from a federal lock and dam project on adjacent navigable streams.[21]

The "public" highways over which the nation may exercise complete control are its "navigable waters." In them, the nation may erect dikes, construct piers, dredge chan-

---

[21] Subsequent cases have limited *Cress to* its facts, but have not overruled it, and have reaffirmed its validity *on* its facts. In *United States v. Chicago, M., St. P. & P. R.R. Co.,* 312 U.S. 592, 599 (1941), which held that no compensation was due for injury to structures located between high and low water mark of the Mississippi River, this Court remanded for resolution of the railroad's claim that two sections of embankment in question were located on a nonnavigable tributary. And in *United States v. Willow River Power Co.,* 324 U.S. 499, 505-07 (1945), which holds that no compensation is due for obstruction of a tailrace by raising of the level of a navigable river by means of a federal dam, this Court distinguished *Cress* as involving damage due to raising of the level of a nonnavigable stream and declined the government's invitation to overrule it.

United States v. Grand River Dam Auth., 363 U.S. 229 (1960), is sometimes claimed to have overruled *Cress.* However, this Court specifically declined to address the government's contention that the navigation servitude extended to nonnavigable streams; it ruled for the government upon the basis of express congressional determination that appropriation of the waters of the nonnavigable tributary was essential to a comprehensive flood control and navigation program. This Court had previously upheld the propriety of such a project, upon grounds of need to protect the navigable capacity of the navigable stream itself, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508 (1941). *Grand River* is further distinguishable in that the property rights asserted were of dubious validity and no more than a noncompensable business expectancy in any event.

nels and place dams,[22] without regard for any private rights. The nation has "always" been interested in preserving these waters for actual or potential needs of commerce.[23]

No comparable national interest exists in fast lands or nonnavigable waters. They lack reasonable potential for commercial use; no public navigation servitude has ever existed over them. The purpose of the servitude limits the scope of its dominant power.

2. The scope of federal regulatory jurisdiction is as broad as full congressional commerce clause power.

The power of Congress to regulate commerce is plenary in nature; its scope is as broad as interstate commerce itself. Congress may regulate commerce wherever it goes, whether the highway on which it travels be water or land, natural or artificial. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 341-42 (1893); *Dow Chemical Co. v. Dixie Carriers, Inc.,* 330 F. Supp. 1304, 1307-08 (S.D. Tex. 1971), *aff'd* 463 F.2d 120, 123 (5th Cir. 1972), *cert. denied,* 409 U.S. 1040 (1972). *Cf. Perry v. Haines,* 191 U.S. 17, 26-28 (1903) (admiralty jurisdiction). The power of Congress extends well beyond its power to regulate navigation on public navigable waters.

[22] *E.g., Gibson v. United States,* 166 U.S. 269 (1897) (dike); *Scranton v. Wheeler,* 179 U.S. 141 (1900) (pier); *Lewis Blue Point Oyster Cult. Co. v. Briggs,* 229 U.S. 82 (1913) (channel); and *United States v. Willow River Power Co.,* 324 U.S. 499 (1945) (dam).

[23] This Court has consistently voiced the view that navigable waters have "always" been subject to the navigation servitude, from its early decision in *Gibson v. United States,* 166 U.S. 269, 276 (1897), to its most recent decision in *United States v. Rands,* 389 U.S. 121, 123 (1967). This theory is hardly viable if applied to fast lands or nonnavigable streams to which the servitude has never applied.

The broad power of Congress over interstate commerce, including navigation, was established in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824). However, in early history, when the needs of interstate commerce were in their incipient stage, this power of Congress lay largely "dormant," other than licensing acts and occasional action on bridges. So long as the power of Congress lay inchoate, the states retained plenary power over their internal waters.[24]

Not until this Court decided *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888), upholding Oregon's right to authorize a bridge obstructing navigation of the Willamette River, did Congress react. It then enacted the Rivers and Harbors Act of 1890 prohibiting unauthorized obstructions to navigable capacity of national waters. Congress later compiled and codified all existing laws for protection of navigable waters in the Rivers and Harbors Act of 1899,[25] which is presently codified as 33 U.S.C. § 401, *et seq.*[26]

[24] *E.g., Willson v. Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 251-52 (1829) (dam across a navigable creek); *Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 725-32 (1865) (bridge across navigable river); *Pound v. Turck,* 95 U.S. 459, 463-64 (1877) (dam and boom across river); *Escanaba Co. v. Chicago,* 107 U.S. 678, 683-87 (1882) (closing of bridge draws during rush hour); *Cardwell v. American Bridge Co.,* 113 U.S. 205, 208-10 (1885) (bridge across river); and *Hamilton v. Vicksburg, S. & P. R.R.,* 119 U.S. 280, 281-82 (1886) (bridge over stream).

[25] This Court has analyzed the legislative history of the Acts in *United States v. Penn. Indus. Chem. Corp.,* 411 U.S. 655, 663-66 (1973); *United States v. Standard Oil Co.,* 384 U.S. 224, 226-28 (1966); and *United States v. Republic Steel Corp.,* 362 U.S. 482, 485-86 (1960). The 1899 Act was not intended to make any substantial change in existing law. However, Congress did add language to the 1899 Act to overrule this Court's construction of the 1890 Act as permitting state as well as federal authorization of obstructions. *See United States v. Bellingham Bay Boom Co.,* 176 U.S. 211, 214-15 (1900); and *North Shore Boom & Driving Co. v. Nicomen Boom Co.,* 212 U.S. 406, 412-13 (1909).

[26] Section 401 prohibits unauthorized construction of bridges, dams and dikes. Section 403 generally prohibits unauthorized ob-

The 1899 Act " . . . was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 201 (1967). Until recently, the Act was usually applied to regulate structures obstructing navigation on naturally navigable-in-fact waterways. *E.g., Union Bridge Co. v. United States,* 204 U.S. 364 (1907); *Louisville Bridge Co. v. United States,* 242 U.S. 409 (1917).

As so applied, the scope of federal regulation was comparable to the scope of the navigation servitude. In recent times, however, the extent of regulation has been greatly expanded and now far surpasses the limits of the navigation servitude.

3. In light of recent history any claim that regulatory power and the servitude are identical in scope must fail.

Seeds of expansive regulation were present in the original Acts. This Court early construed the 1890 Act, in *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 708 (1899), to reach activities on nonnavigable streams substantially affecting the capacity of navigable waters. *See also Sanitary District of Chicago v. United States,* 266 U.S. 405, 428-29 (1925) (construing the 1899 Act). But regulation did not attain extended application until recent times.

Currently the 1899 Act is applied far beyond the bounds of the navigation servitude. It has ceased to be a limited

structions. Section 404 authorizes establishment of harbor lines. Section 407 prohibits deposit of refuse. Section 409 prohibits obstruction by vessels. The foregoing description is necessarily general and the words of each section must be referred to for a full appreciation of their scope.

statute for protection of public navigation and has become an instrument of environmental protection.

This Court itself has charitably construed the 1899 Act and provided the impetus for expansive environmental regulation. *United States v. Republic Steel Corp.,* 362 U.S. 482 (1960) (discharge of industrial solids); *United States v. Standard Oil Co.,* 384 U.S. 224 (1966) (discharge of aviation gasoline).

In December 1968, the Corps of Engineers published new regulations stating for the first time that pollution, environmental, and conservation factors would be considered in passsing upon permit applications. *See United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 672-73 (1973). Consideration of such factors, in the context of permits for work in navigable-in-fact waters, was expressly upheld in *Zabel v. Tabb,* 430 F.2d 199, 207-14 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971).

Thereafter, the Corps extended its environmental program by asserting jurisdiction over tidal marshes which were in no sense navigable-in-fact. This position was first upheld in *United States v. Baker,* 2 E.R.C. 1849 (1971) (unofficial report of oral decision). Subsequently, the Corps amended its regulations to assert jurisdiction over all tidal waters, regardless of navigability-in-fact. 37 Fed. Reg. 18291 (1972) (first codified in 33 C.F.R. § 209.260(k)(2), now § 329.12(b)). Favorable rulings were ultimately obtained from other courts.[27]

Moreover, the Fifth Circuit, in *United States v. Sexton Cove Estates, Inc.,* 526 F.2d 1293, 1296-99 (5th Cir. 1976),

[27] *E.g., United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 604-06, 610 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975); *United States v. Cannon,* 363 F. Supp. 1045, 1050 and n. 3 (D. Del. 1973); and *United States v. Lewis,* 355 F. Supp. 1132, 1136-37 (S.D. Ga. 1973).

although unwilling to give the Corps jurisdiction over all waters subject to tidal fluctuations,[28] has resurrected *Rio Grande's* "affect" test to uphold Corps' jurisdiction over fast land activities which affect adjacent navigable waters.

Congress has authorized even broader regulatory jurisdiction in the Water Pollution Control Act of 1972. 33 U.S.C. § 1251, *et seq.* "Navigable waters" are defined in 33 U.S.C. § 1362(7) to include "the waters of the United States," a term courts have consistently interpreted to apply to discharges into nonnavigable as well as navigable waters. *E.g., United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753-56 (9th Cir. 1978); and *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977). Even a discharge into municipal sewers has been held within the coverage of the Act. *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976).

The expansion of jurisdiction effected by these cases is illustrated by this Court's opinion in *Leovy v. United States*, 177 U.S. 621 (1900). There, this Court considered the navigability of Red Pass, a crevasse created by Mississippi River overflow and which at one end had become a sea marsh; this Court discussed the question entirely in terms of navigability-in-fact and did not suggest that any tidal portion of the pass might on that ground alone be navigable.

In recent amendments to its regulations, the Corps of Engineers has also asserted jurisdiction over artificial water bodies subject to the ebb and flow of the tide pursuant to the Third Circuit opinion in *Stoeco Homes, supra*, by adding a new sentence to 33 C.F.R. § 329.8(a)(i) (formerly § 209.260(g)(1)(i)). *See* 42 Fed. Reg. 37133 (1977). The Corps recognizes that its regulatory authority and a right of public access are not coextensive, for it continues to concede that a privately constructed and operated canal not used in interstate commerce may remain private. 33 C.F.R. § 329.8(a)(3) (formerly § 209.260(g)(1)(iii)).

[28] As the Court retorted, in the context of canals exhibiting tidal fluctuation after excavation: "If it did, every hole dug in South Florida would be within the Corps' jurisdiction." 526 F.2d at 1299.

The scope of federal regulatory jurisdiction has been considerably extended in a comparatively short period of time. The commerce power has already overflowed the beds and shores of navigable waters and been extended far inland. The focus of regulatory authority has shifted from prevention of obstructions to navigation to a broad environmental protection program. Whatever coincidence there may once have been between the respective scopes of federal regulatory authority and the federal navigation servitude no longer exists. The regulatory power has now far surpassed the servitude.

III.

The Navigation Servitude Does Not Apply to a Private Nonnavigable Water Body Rendered Navigable-in-Fact Only by Extraordinary Private Efforts.

A. *Kuapa Pond in Its Natural Condition Was a Private Nonnavigable Water Body.*

Kuapa Pond in its natural condition[29] was an isolated inland water body cut off from the open sea by a barrier beach formation and had existed in this condition from as early as 1350 (Tr. 90, LL. 11-12). Its shallow waters restricted navigation to flat-bottomed boats; the wall of the pond made it impossible to navigate to adjacent ocean waters. It was never used commercially except for propagation of fish within the pond itself (R. 264-66).

Navigation by boats of so shallow a draft as the boats that tended mullet in Kuapa Pond has never sufficed for navigability purposes. *E.g., Leovy v. United States*, 177

---

[29] By "natural condition" is meant the condition of the pond as historically recorded. At some prehistoric time the area of the pond may have been fast land or sea or part of each.

U.S. 621, 633 (1900) (small luggers or yawls used by fishermen); *Pitship Duck Club v. Sequim,* 315 F. Supp. 309 (W.D. Wash. 1970) (small duck hunting boats); *North American Dredging Co. of Nevada v. Mintzer,* 245 F. 297 (9th Cir. 1917) (duck boats or punts for hunting or fishing); and *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F. 680 (6th Cir. 1898) (canoes and flat-bottomed ducking boats).

Nor was Kuapa Pond navigable under *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940). Pursuant to that opinion, the potential improvements must be "reasonable" with "a balance between cost and need." As the District Court noted, the government presented no evidence on the need for or cost of improvement of the pond in its natural condition (Pet. App. 23a-24a). The record is devoid of any suggestion that there was ever a reasonable need to improve Kuapa Pond for navigation.[30]

The government's contention that Kuapa Pond was navigable simply because it exhibited tidal fluctuations is wholly inconsistent with the navigability-in-fact test.[31] This court characterized the ebb and flow test as not "any test at all" in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). While that case involved an inland river, the navigability-in-fact test it adopted is of uniform application to tidal and nontidal waters alike; it would be as arbitrary to classify shallow creeks as navigable solely because some tidal influence is present as to draw tidal lines across the Mississippi. Kuapa Pond was not part of the adjacent ocean;

[30] Petitioners did introduce evidence of the great expense involved in the actual improvement of Kuapa Pond to negate any suggestion that there was ever any reasonable economic need to improve it for navigation (Tr. 100-05; Defendants' Exhibit 31).

[31] This contention was not reached below. *See* note 1 *supra.*

to hold it navigable solely on account of tidal flow would be an illogical application of the servitude's commercial needs.[32] The Corps consistent administrative treatment of the pond as nonnavigable, until the present litigation, is also "not without significance."[33] *United States v. Oregon,* 295 U.S. 1, 23 (1935).

Even assuming that the ebb and flow test may form a valid basis for a servitude over certain tidal waters, the government may make no claim on that ground to Kuapa Pond. By passage of § 95 of the Organic Act, Congress recognized unique exclusive rights in Hawaiian fish ponds, thereby surrendering any servitude it arguably might have had. This surrender was in fact recognized by the government until the early 1970's when it first asserted a right of public access to Kuapa Pond. An analogy is found in *United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 610-11 (3d Cir. 1974), where land filled in 1927 was characterized as having "long since been surrendered" due to lack of Corps of Engineers objection prior to 1970. Likewise, the

[32] The Government is wont to rely upon general language such as: "[Congress'] power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water." *Greenleaf-Johnson Lumber Co. v. Garrison,* 237 U.S. 251, 263 (1915); "[W]hatever rights [existed] in the land below the mean high-water line were subordinate to the public right of navigation. . . ." *Willink v. United States,* 240 U.S. 572, 580 (1916); and, "The dominant power of the federal Government, . . . , extends to the entire bed of a stream, . . ." *United States v. Chicago, M., St. P. & P. R.R. Co.,* 312 U.S. 592, 596-97 (1941).

The language used was apt for the facts of those cases as each involved delineation of the limits of a single river. No separate water body was involved in any of these cases; nor was the ebb and flow test applied. Such general language is hardly firm footing for resurrection of ebb and flow from a 100 years of repose as a qualification on the general navigability-in-fact test.

[33] It continued to do so even after development began and listed Kuapa Pond as a private facility in its 1964 report on Hawaiian coastal waters (Defendants' Exhibit 16).

Corps failed to express any interest in or concern over activities in Kuapa Pond from annexation until after 1970.

B. *The Navigation Servitude Does Not Apply to Privately Improved Nonnavigable Waters.*

This Court has never maintained that the navigation servitude is coextensive with commerce clause regulatory authority. Indeed, in *United States v. Kansas City Life Insurance Company,* 339 U.S. 799 (1950), the more limited nature of the servitude was expressly acknowledged:

> It is not the broad constitutional power to regulate commerce, but rather *the servitude derived from that power and narrower in scope,* that frees the Government from liability in these cases. . . . (Emphasis added.)

339 U.S. at 808.

The distinction between regulatory authority and the servitude has always existed. Regulatory power always had a broader scope as *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690 (1899), long ago settled in holding that the upper Rio Grande was nonnavigable but nonetheless subject to regulation. Recent expansion of the regulatory power merely highlights a fundamental distinction which has long existed.

The boundary of the servitude lies at the limit of "public" navigable waters. Although regulation has travelled far beyond these bounds, the servitude has not. This Court has never applied the servitude to fast lands, nor to nonnavigable waters, at least without an express determination by Congress that inclusion was essential to a comprehensive navigable waters improvement program. *United States v. Cress,* 243 U.S. 316, 325-26 (1917). *Cf. United States v. Grand River Dam Authority,* 363 U.S. 229, 232-33 (1960).

The justification for dominant national control over navigable waters has been the need "to preserve" them for present or future commercial needs. *See Economy Light & Power Co. v. United States,* 256 U.S. 113, 123-24 (1921); *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 404-05 (1940). For this purpose, the nation's navigable waters have been considered to have "always" been subject to the servitude. This view was expressed in *Gibson v. United States,* 166 U.S. 269, 276 (1897), and has been adhered to ever since. *E.g., United States v. Rands,* 389 U.S. 121, 123 (1967); *United States v. Commodore Park, Inc.,* 324 U.S. 386, 390-91 (1945). This Court expressed the same point in *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, at 808 (1950):

> The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. . . . This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. . . . (Citations omitted.)

The premises upon which the navigation servitude have been based—that the nation's waters must be "preserved" and that the private right in the underlying soil has "always" been subject to the servitude and "long has been limited" by the paramount public rights it represents—have no validity as to nonnavigable waters. The public has never been interested in their preservation and should not care whether they are improved for water traffic or allowed to deteriorate and become even less navigable than

before. *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69-70 (1913) ("no public interest" in nonnavigable streams). There is no public expectation of their improvement nor any logical right to their uncompensated use as improved.

While this Court has not rendered an opinion directly on point, *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852), does come close to the mark. The Maine legislature had authorized private parties to undertake improvements on the River Penobscot to render upper stretches of the river navigable, granting an exclusive license to navigate the improved stretch for twenty years. The grantees' assignee completed the work and put steamboats into service. Veazie appeared with his own steamboat, properly enrolled and licensed for the coasting trade, and placed her on the river until enjoined. As opposed to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), *Veazie* involved an exclusive license for internal commerce on locally improved nonnavigable waters. This Court, in distinguishing *Gibbons* declared:

> A license to prosecute the coasting trade, is a warrant to traverse the waters washing or bounding the coasts of the United States. *Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a State, or the watercourses partaking of the character of canals exclusively within the interior of the State, and made practicable for navigation by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this, is,* in the first place, a departure from the obvious meaning of the document itself, and *an abuse wholly beyond the object and the power of the government in granting it.* (Emphasis added.)

55 U.S. at 575. While conceptions of federal power over local commerce are no longer as limited as then envisioned, this Court's discussion of the lack of public right to navigate privately improved nonnavigable internal waters remains as persuasive today as at that time.

More recently, the United States Attorney General reached the same conclusion. His opinion was requested as to the federal right to take over waterways owned by the State of Illinois in advance of a formal transfer of title. The Attorney General recognized such a right as to portions which were improved navigable streams.[34] As to wholly artificial portions, however, which like nonnavigable streams had never been subject to the servitude, he concluded that these could not be appropriated without compensation.[35]

> Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, *it does not follow that the United States*

---

[34] In *United States v. Cress*, 243 U.S. 316, 326 (1917), this Court itself recognized that navigable rivers which were "canalized" by the government would remain navigable waters despite their improvement. Continued subjection of a navigable stream made more navigable at public expense is, of course, a quite different matter than subjecting a private nonnavigable water body improved at private expense to a public servitude.

[35] Canals constructed at public expense were usually open to the public subject to payment of reasonable tolls. *See, e.g., Huse v. Glover*, 119 U.S. 543 (1886); *Sands v. Manistee River Improv. Co.*, 123 U.S. 288 (1887). They were public because they were public highways built by the states or under their charter, just as are modern freeways, not because of any dominant federal servitude. They therefore could be abandoned at any time. *See, e.g., Walsh v. Columbus, Hocking Valley & A. R.R. Co.*, 176 U.S. 469 (1900); *Kirk v. Maumee Valley Elec. Co.*, 279 U.S. 797 (1929).

> *could take possession of it, appropriate it, exclude the owner, and deprive the latter of any investment upon it.* (Emphasis added.)

36 OP. U.S. ATT'Y. GEN. 203, 214 (1930).

Although Kuapa Pond now has also been held subject to federal regulation, there is no basis to burden it further with the navigation servitude and free public access. The servitude's rule of "no compensability" is harsh even as applied to public navigable waters. To apply the servitude to privately improved nonnavigable waters such as Kuapa Pond would be a particularly severe extension—one transforming a doctrine intended to preserve *public* waters into a device for expropriation of *private* waters.

C. *Application of the Navigation Servitude to Nonnavigable Waters Would Constitute an Unjustified Intrusion Into Local Real Property Issues.*

Extension of the navigation servitude to Kuapa Pond involves enormous implications. Nonnavigable water bodies located entirely within a single state, which heretofore have never been considered susceptible to commerce, will be potential objects of dominant federal power. The acknowledged legal distinction between public navigable waters and private nonnavigable waters will be abrogated. The servitude will extend to thousands of private waters never before within its reach.[36]

To subject these local waters to the servitude serves no valid federal interest. When the question is surface use

[36] In point of fact, the Corps of Engineers deems all water bodies subject to the Rivers and Harbors Act to be subject to the navigational servitude and has represented to this Court that all permits are now and will continue to be conditioned upon the permittee's agreement to permit "the full and free use by the public" (Opp. Brief at 19-20).

of internal waters, as opposed to use of the public navigable water highways, the states themselves should be the arbiters.

This Court has often emphasized that the states are sovereign over navigable waters and the lands beneath them, subject only to the paramount need of the United States for purposes of control of interstate commerce. *E.g., United States v. Texas,* 339 U.S. 707, 716-17 (1950); *United States v. Oregon,* 295 U.S. 1, 14 (1935). The states are free to determine title rights of owners of lands abutting navigable waters. *E.g., Shively v. Bowlby,* 152 U.S. 1, 40-47 (1894). The states are also free to define the extent of riparian rights in navigable waters. *E.g., St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners,* 168 U.S. 349, 358-66 (1897).

State sovereignty was recently reaffirmed in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977), by its holding that state law generally controls issues relating to riparian property:[37]

> This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

[37] This Court overruled its opinion in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), which had applied federal common law to determine title to reemerged lands. This Court refrained from overruling *Hughes v. Washington,* 389 U.S. 290 (1967), which had applied federal law to determine title to accretions on ocean-front property, noting that the fact that ocean boundaries were there involved was sufficiently different to justify application of federal common law. *See* 429 U.S. at 377 n. 6. Whatever vitality *Hughes* retains is of no consequence here, however, where no dispute has arisen as to the boundary between land and ocean for boundary purposes.

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. . . .

429 U.S. at 378.

When the riparian property rights relate to private nonnavigable waters, as here, the reasons for applying state law are even more compelling. No pre-existing navigation servitude qualifies state control. No general public interest exists in private waters.

IV.

Mandating Public Access to Kuapa Pond Violates Fifth Amendment Protections Against Uncompensated Takings.

A. *Kuapa Pond Was Never Subject to Any Superior Public Navigation Servitude.*

Bishop Estate, and its lessee Kaiser Aetna, hold exclusive title to the beds, walls and waters of Kuapa Pond, and are entitled to exclude all others therefrom. Kuapa Pond is a private body of water which has never been subject to the navigation servitude.

As the District Court, the tribunal most familiar with the present problem, properly held:

> [T]he dominant federal navigation servitude arises from the common law *public* right to pass over *naturally* navigable waters.
>
> . . .
>
> Here, however, . . . there never existed any public rights in or to the waters of Kuapa Pond, nor did its transformation into the present marina, by private

> funding, create, *ipso facto,* any *public* rights therein or thereto.
>
> . . .
>
> [W]hile Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof.

(Pet. App. 31a-32a.) The Ninth Circuit cavalierly dismissed this proposition without analysis.

B. *This Court Has Not Previously Considered Whether a Public Water Area Can Be Created Under the Guise of a Navigation Servitude.*

While the navigation servitude has been the subject of repeated litigation, a case by case review will not be of significant utility because the Court has not confronted circumstances comparable to the present case.[38] Hereto-

---

[38] *Gibson v. United States,* 166 U.S. 269, 275-276 (1897) (no compensation need be paid where access to the Ohio River was cut off as an incidental consequence of construction of a federal dike); *United States v. Bellingham Bay Boom Co.,* 176 U.S. 211, 218 (1900) (compensation required when the government ordered abatement of a boom on the Nooksack River constructed prior to passage of the Rivers and Harbors Act); *Scranton v. Wheeler,* 179 U.S. 141, 164-65 (1900) (riparian proprietor not entitled to compensation when access to St. Mary's Falls ship canal waters destroyed by government project); *United States v. Lynah,* 188 U.S. 445, 470 (1903) (compensation required when property in cultivation inundated by dam raising water level of the Savannah River); *Union Bridge Co. v. United States,* 204 U.S. 364, 401 (1907) (no compensation awarded for incidental loss when alterations to a bridge over the Allegheny River were required by Secretary of War pursuant to Rivers and Harbors Act); *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 62, 68-69 (1913) (no compensation awarded when power company's plant on St. Mary's River and uplands were condemned in the interest of improving naviga-

fore, when governmental authorities invoked the servitude to avoid compensating a private entity or individual, a specific project existed. In this case, no dam, irrigation, reclamation or hydroelectric project will be facilitated; no

tion); *Lewis Blue Point Oyster Cult. Co. v. Briggs*, 229 U.S. 82, 88 (1913) (no compensation awarded for destruction of proprietor's oyster beds in Great South bay incident to government dredging in the interests of navigation); *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 267-68 (1915) (no compensation awarded where wharves located within harbor on Elizabeth River were required to be removed); *Willink v. United States*, 240 U.S. 572, 580 (1916) (no compensation paid when proprietor prevented from renewing wharves necessary for ship repair business on Savannah River); *Louisville Bridge Co. v. United States*, 242 U.S. 409, 417-18 (1917) (no compensation awarded where bridge alterations were required to relieve an obstruction to navigation on Ohio River); *United States v. Cress*, 243 U.S. 316, 326 (1917) (compensation granted to property owner for decreased land value where government dam caused inundation of nonnavigable tributary; *United States v. Appalachian Power Co.*, 311 U.S. 377, 427 (1940) (no compensation need be paid when government, pursuant to Federal Power Act, takes over power project on New River because no private property right existed in the flow of a navigable stream); *United States v. Chicago, M., St. P. & Pac. R.R.*, 312 U.S. 592, 597 (1941) (no compensation for loss of embankment when government dam raised water level of Mississippi River); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390-93 (1945) (no compensation paid to riparian owner when navigability of creek adjacent to bay destroyed by government dredging for Hampton Roads Naval Base); *United States v. Willow River Power Co.*, 324 U.S. 499, 509-10 (1945) (no compensation when proprietor's channel from nonnavigable tributary to navigable stream was impeded by government dam project on Mississippi River); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808-812 (1950) (compensation required for waterlogging private agricultural land bordering a nonnavigable tributary caused by dam and lock project on Mississippi River); *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956) (no compensation payable for value of land as power site taken for flood control project for Savannah River Basin); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 236 (1960) (no compensation awarded when development potential of nonnavigable stream was destroyed by government dam completed as an integral part of a comprehensive plan to regulate navigation, control floods and produce power); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 629-30 (1961) (compensation awarded for loss of

obstruction to navigation such as a wharf, dike or pier will be abated, and no environmental protection will be achieved with respect to Kuapa Pond which cannot be accomplished by regulation.

The Corps of Engineers is not acting to protect avenues of commerce when their activity results in the creation of a public water recreation area. In *Federal Power Commission v. Niagara Mohawk Power Co.*, 347 U.S. 239, 249 (1953), this Court recognized that an attempt to exercise the navigation servitude for nonnavigational purposes "requires clear authorization" in explicit terms. Congress has not specifically authorized the Corps of Engineers to pursue any project or purpose within Kuapa Pond.

This Court's decided cases may only be harmonized to the extent that when a private property right was recognized, payment of compensation was required. Conversely, when private property was held to have been burdened with a dominant servitude, and an authorized public project was advanced, the noncompensability rule was applied.

In the analogous case of *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1893), a private right to control access to a navigable water via a system of locks and tolls was taken by condemnation. The government was required to pay for the franchise, as well as for tangible personal property. The Court emphasized that congressional power to regulate commerce was limited by the fifth amendment just compensation clause. *Id.* at 336.

an easement caused by dam on Roanoke River based on the nonriparian value of the property); *United States v. Rands*, 389 U.S. 121, 125-26 (1967) (compensation award pursuant to government's comprehensive Columbia River development plan could not include property value as port site).

While *Monongahela* has been distinguished as resting "primarily upon the doctrine of estoppel . . .," *e.g., United States v. Rands,* 389 U.S. 121, 126 (1967), it has not been overruled and remains a signal case concerning the proper exercise of the federal navigation servitude. Its principles of fairness and equity are applicable in the instant case. *See also United States v. Virginia Electric & Power Co.,* 365 U.S. 624, 631 (1961).

Petitioners' loss will be closely akin to that of the franchise owner in *Monongahela.* The franchisor maintained exclusive navigation rights and charged tolls in exchange for permission to pass. When the government condemned its right, compensation was awarded. In the case of Kuapa Pond, Petitioners charge maintenance fees, similar to tolls, in exchange for permission to use its privately maintained waters for limited recreational purposes.

Dictum in *Scranton v. Wheeler,* 179 U.S. 141 (1900), is relevant, even though the riparian property owner was found not to be entitled to compensation when his access to a publicly navigable river was destroyed.

> Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case.

Id. at 153. The Court proceeded to discuss *Monongahela* as an instance requiring compensation because there was an actual taking of vested private rights, *i.e.,* locks, dams and the franchise to collect tolls, and distinguished Wheeler's claim to be entitled to access, because it found he had no such private right. If the Circuit Court decision herein is affirmed, both tangible and intangible property will be taken without compensation. *See also Louisville Bridge Co. v. United States,* 242 U.S. 409, 422-23 (1917).

The government never expressed any interest in Kuapa Pond until 1971 when it had been improved at great expense. These private efforts transformed Kuapa Pond from a shallow fish pond into a pleasant recreational haven and small boat harbor. The government seeks to appropriate these waters at no public expense.

C. *The Invasion of Petitioners' Private Property Is a Constitutionally Prohibited Taking.*

This Court recognized that private ownership of waters exists in *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69 (1913). "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *See also United States v. Twin City Power Co.,* 350 U.S. 222, 241 (1956) (separate opinion). Kuapa Pond is wholly upon the land of Petitioners, and does not qualify as a great navigable water body by any standard set forth by this Court.

The loss of the rights to control surface use and to charge maintenance fees will render Petitioners and the residential lot lessees the victims of the worst of two worlds. On one hand, costly original investment and improvements will be confiscated (Defendants' Exhibit 31; Tr. 100-05).

On the other hand, dredging and other maintenance activities will have to be continued if the Pond is to be preserved in its present condition.

Security problems may result from the loss of privacy. Until the Ninth Circuit decision, a patrol boat insured that unauthorized persons did not gain entrance to Kuapa Pond and possible access to homes, in a manner similar to a fast land restricted residential development with controlled private street access.

Environmental problems may result if private funding for the pond ceases. As the Corps of Engineers has no funds to maintain the pond (R. 260-261), termination of private dredging operations will cause silt to build-up in the channels (Tr. 101-02), and termination of patrol boat operations will result in an accumulation of debris and litter (Defendants' Exhibit 37).[39]

Finally, increased pollution and boat traffic may interfere with fishing and fish propagation which the government has consistently conceded to be Petitioners' exclusive right.

The result will be a *public* water playground. Yet, the government denies both the need to compensate Petitioners for their loss and any responsibility to maintain the pond.[40] If the public enjoys recreational surface uses, fairness and

[39] The dangers are illustrated by *Botton v. State*, 69 Wash.2d 751, 420 P.2d 352 (1966). There, the state's action in granting public access to a private lake created such major environmental problems and nuisance to private property owners that the court enjoined the state from permitting public access without compensation.

[40] The government candidly stipulated below that it had no intention of appropriating any funds for maintenance of Kuapa Pond (R. 261).

justice require the public to contribute to requisite maintenance and to pay for the costly improvements made by private funding.

1. Mandating public access is a taking, not an exercise of regulatory authority.

That which the government seeks to accomplish by exercising "regulatory" authority may properly be termed inverse condemnation, *i.e.*, the expropriation of private property absent employment of eminent domain proceedings, thus destroying Petitioners' exclusive enjoyment of its property rights.

In *Wilfong v. United States*, the Court of Claims set out:

> [T]he principle that to support a Fifth Amendment taking via inverse condemnation there must be not only a Federal activity or project which is permanent in nature, but that such activity or project must impose on private property certain consequences which are themselves permanent, and that their recurrence is inevitable even if only intermittent. By "permanent" we include a servitude of indefinite duration.

480 F.2d 1326, 1329 (Ct. Cl. 1973). This theme is echoed in *United States v. Dickinson*, 331 U.S. 745, 748 (1947). "Property is taken in a constitutional sense when inroads are made upon an owner's use of it to an extent that, . . . a servitude has been acquired. . . ."

Additionally, courts have distinguished taking and regulation by considering the purpose of the activity. For instance, where restrictions are placed on private property to prevent public harm, such restrictions are noncompensable police power exercises, while, on the other hand, restrictions through which the public attains benefits it did

not previously possess are takings requiring compensation. Justice Brandeis distinguished regulation and taking in *Nashville, Chattanooga & St. Louis Railway v. Walters,* 294 U.S. 405, 429 (1935):

> It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. (Citation omitted.) . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. (Citation omitted.)

See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-414 (1922); *Goldblatt v. Hempstead,* 369 U.S. 590, 594-95 (1962). *See generally* 1 NICHOLS, EMINENT DOMAIN § 1.42 (3d rev. ed. 1976). No public harm is sought to be prohibited in Kuapa Pond, rather the government seeks to attain for the public benefits it has not heretofore possessed.

The power of eminent domain is often exercised to establish public recreation and historic areas. *See, e.g., Shoemaker v. United States,* 147 U.S. 282 (1893); *United States v. Gettysburg Electric Railway Co.,* 160 U.S. 668 (1896); *Rindge Co. v. Los Angeles County,* 262 U.S. 700 (1923); *Roe v. Kansas ex rel. Smith,* 278 U.S. 191 (1929). Accordingly, if the government wants to provide the public with the recreational opportunities of Kuapa Pond, it should follow condemnation procedures and pay the defendants for the value of their private rights.

2. When private property is taken for public use, just compensation is required.

The fifth amendment prohibits taking of private property for public use without due process of law and payment of just compensation. This Court affirmed that the fifth amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). If the Corps of Engineers, under the guise of regulatory authority pursuant to the commerce clause, is permitted to mandate public surface use of Kuapa Pond, Petitioners will be forced to bear what should be a public burden.

D. *The Navigation Servitude Has Been Expanded Beyond Its Intended Scope and Merit Clarification.*

Petitioners do not quarrel with a properly limited notion of superior federal power over water bodies traditionally considered to have been subject to a public right of way. However, usurpation of Petitioners' private right to Kuapa Pond on the pretext of the navigation servitude creates an unwarranted exception to the fifth amendment, representing a dramatic departure from every other exercise of authority under the commerce clause or alternative constitutional power.

Public policies distinguishable only on the basis of land and air versus water are irrational and illogical. The government argues, and the Ninth Circuit holds, that taking private water rights by tacking the navigation servitude to regulatory power is noncompensable. Yet, courts have consistently held that to obtain public or common rights to land or air space, presumably equally sacrosanct, requires compensation. *See United States v. Causby,* 328 U.S. 256 (1946); *Griggs v. Allegheny County,* 369 U.S. 84 (1962);

Richards v. Washington Terminal Co., 233 U.S. 546 (1914); *Shoemaker v. United States, supra; United States v. Gettysburg Electric Railway Co., supra; Rindge Co. v. Los Angeles County, supra; Roe v. Kansas ex rel. Smith, supra.*

The Ninth Circuit and the government recite the history of the servitude by way of justifying its expanded application in the present case. The government claims that no obligation to pay compensation exists because it is merely invoking the navigation servitude. Therefore, nothing has been "taken," *i.e.*, waters deemed subject to the servitude were always subject to an easement in favor of public use, simply awaiting determination of when and where it might be exercised with impunity to destroy private rights.[41] The foregoing rationale is unsatisfactory in this and similar circumstances, where private water bodies exist which were never subject to a public right of way.[42] *See generally*

[41] In some cases, the riparian proprietor of a water body is said to have been on notice that its property is subject to a dominant public interest, therefore, it is not entitled to compensation and invests funds for improvements at its own risk. *See United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Union Bridge Co. v. United States*, 204 U.S. 364, 400 (1907). *See also* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 23-5 (1963).

Public use of Kuapa Pond cannot be sustained on a "notice theory" as no one ever considered Kuapa Pond public, and Petitioners could not have been on notice that a servitude might one day be invoked to destroy their investment. A notice theory may support the servitude doctrine in some cases, but in all instances its scope must be limited to waters deemed navigable pursuant to tests applicable when the servitude first attached.

[42] The inequity of such an action was recognized in *Sneed v. Weber*, 307 S.W.2d 681 (Mo. App. 1957), wherein the owner of the lands underlying a fresh water lake had undertaken privately to effect improvements so that boating was possible. Although difficult, access to the Mississippi River was available. The argument that the owner had transformed the lake into public waters was rejected on several grounds in an opinion analyzing both state and federal

MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 513 (1975).

The expansive American application is even more difficult to understand because the servitude has been characterized as derived from and narrower than the commerce clause. *See, e.g., United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 808 (1950). In any case, nowhere does the Constitution provide that the commerce clause, however contorted its application may become, is superior to the fifth amendment. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); *Scranton v. Wheeler*, 179 U.S. 141, 153-54 (1900).

Originally, the no compensation rule may have been a reasonable consequence of the government's need to protect publicly navigable waters. Critical, however, to contemporary evaluation of attempts to invoke the servitude is the knowledge that when the Constitution was adopted and early decisions established the servitude's existence, virtually all American commerce was by water. Until the advent of the railroad in the Nineteenth Century, "commerce" and "navigation" were nearly synonymous, with only visionary thinkers dreaming of overland and air "highways" supporting the bulk of contemporary commerce. *See* Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 671 (1963).

In these circumstances to deny compensation on the ground that the servitude is merely the exercise of a public

cases. "To declare the drainage ditch and Weber Lake navigable waters would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression." (Citation omitted.) 307 S.W.2d at 689.

right is an abuse of power, and should not be done in the absence of an unquestioned historic foundation for the public right claimed. No such historic foundation exists here. As one commentator has pointed out: "It is of doubtful propriety to rationalize the continued preference of waterways on the basis of reasons that are no longer applicable." Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 NAT. RES. J. 1, 31 (1963). *See also Note,* 19 CASE WEST. RES. L. REV. 1116, 1122-23 (1968).

In the case of Kuapa Pond, the attempted noncompensable taking of private property cannot be justified as incident to a noncompensable exercise of regulatory powers pursuant to commerce powers. If Petitioners' property were taken in the exercise of a different power for a different purpose, compensation would be mandatory. *See* 2 CLARK, WATER AND WATER RIGHTS § 101.5 (1967).

The public navigation servitude is uniquely severe. This power over waters has no parallel on land. The servitude has been subject to severe criticism even as traditionally applied; so harsh a doctrine should be strictly limited. The nation's commercial needs can be satisfied without destroying private rights.

CONCLUSION

The judgment of the Circuit Court reversing the District Court's denial of an injunction mandating public access to Kuapa Pond should be reversed.

Respectfully submitted,

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richards Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
ROBERT BRUCE GRAHAM, JR.
HAMILTON, GIBSON, NICKELSEN
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

No. 78-738

In the Supreme Court of the United States

OCTOBER TERM, 1978

KAISER AETNA; BERNICE P. BISHOP ESTATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

RAYMOND N. ZAGONE
KATHRYN A. OBERLY
MARTIN GREEN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases: Page

Cases—Continued Page

Cases—Continued Page

Constitution, statutes and regulations:

Constitution, statutes and regulations—Continued Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 584 F.2d 378. The opinion of the district court (Pet. App. 13a-34a) is reported at 408 F. Supp. 42.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1978. The petition for a writ of cer-

tiorari was filed on November 2, 1978, and granted on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a former "fishpond" in Hawaii which has been deepened and opened to Maunalua Bay and the Pacific Ocean for the purpose of navigation is a navigable water of the United States subject to a public right of navigation.

STATEMENT

For hundreds of years prior to 1961, Kuapa Pond, on the Island of Oahu in Hawaii, was used to cultivate mullet. Separated from Maunalua Bay and the Pacific Ocean by a narrow barrier beach reinforced with a stone wall, the pond was fully enclosed and no more than two feet deep. Mullet were seeded in the pond, grown and harvested. During high tides, sea water from the bay and ocean entered the pond through sluice gates in the barrier, which allowed small fish to enter but not large fish to escape, thus flushing the pond and enriching the crop (Pet. App. 15a-16a). Such "fishponds" are characteristic features in Hawaii and have provided an important source of food (*id.* at 3a).

On April 27, 1961, the trustees under the will of the estate of Bernice Pauahi Bishop, the owners of the bed of Kuapa Pond and the surrounding land, entered into a development agreement with Kaiser Aetna (A. 6-7, 11-12, 31; R. 46).[1] The agreement gave

[1] "R." refers to the record in the court of appeals.

Kaiser Aetna the right to develop a 6000-acre area known as "Hawaii Kai" (A. 31) and contemplated that Kaiser Aetna would improve and eventually lease Kuapa Pond from the trustees, who retained the fee interest (A. 17, 31; R. 266). On July 24, 1962, the trustees extended to the lessees of each marina lot a nonexclusive right to navigate Kuapa Pond (Def. Exh. 13), reserving to the trustees the right to license anyone else, including operators of commercial vessels (*ibid.*).[2]

Shortly after the 1961 agreement, all fishpond operations in Kuapa Pond were terminated and its transformation into a navigable waterway and marina began. Kuapa Pond was dredged to lower the bed and thereby deepen the water for navigation. At this time, the Army Corps of Engineers advised Kaiser Aetna that no permit would be required under 33 U.S.C. 403 for the dredging in Kuapa Pond itself (A. 60).

In 1966, however, Kaiser Aetna decided to open Kuapa Pond to Maunalua Bay for navigation. On March 28, 1966, Kaiser Aetna's project engineer delivered to the District Engineer of the Corps of Engineers plans for dredging a channel 200 feet wide and nine feet deep and invited the District Engineer to comment on the plans so that any necessary revisions could be made and a permit issued under 33 U.S.C. 403

[2] On October 17, 1967, the trustees leased Kuapa Pond to Hawaii-Kai Community Services Company (A. 25), which, in turn, assigned the lease to Kaiser Hawaii-Kai Development Company, effective January 1, 1971 (R. 22-23; Def. Exh. 11-12).

(A. 66-67).[3] On April 5, 1966, the Corps replied that the plans might cause erosion of the beach and that a jetty might be necessary (A. 56). Neither letter mentioned any denial of public access to the waterway. On April 26, 1966, the project engineer sent a letter to the Corps which stated, among other things, that "[i]t is our understanding that no separate federal permit will be required for this construction [on the Kuapa Pond side of the barrier beach] and that there will no requirement for public use of any waters on the Kuapa Pond side of the bridge" (A. 58).[4] Although the federal permit was issued to allow Kuapa Pond to be opened to the Bay, petitioners never received, so far as the record discloses, any confirmation from the Corps of the assertion that the public could be excluded from Kuapa Pond.[5]

---

[3] The plans also called for raising the existing bridge, part of the highway built earlier on the barrier beach, to provide a clearance for vessels of 13.5 feet above mean high tide (A. 66).

[4] This letter (A. 58) was addressed only to the "Corps of Engineers" and was not addressed to the attention of the author of the Corps' letter of April 5, 1966. Nor did it refer to the Corps' "reference number" for the Hawaii-Kai project, which appeared on the Corps' letter of April 5.

[5] Contrary to petitioners' statement (Br. for Pet. 7), the record does not show that, at the time the channel was dredged and the bridge raised, it was "understood by the Corps of Engineers * * * that the marina was private, and that no permits were necessary for work in Kuapa Pond." The materials cited do not support this claim. Defendants' Exhibit 15 (A. 58) is the letter of April 26, 1966, written by Kaiser Aetna, not the Corps, asserting that the waters were "private" (A. 58). Defendants' Exhibit 16 is an excerpt from a report of the District Engineer prepared in 1964 (before the opening of Kuapa Pond to the Bay) stating that the development at Hawaii-Kai is "private." The excerpt does not discuss whether permits are required for work in Kuapa Pond or whether the public may be denied access thereto. Similarly, Defendants' Exhibit 36 (A. 59) is an affidavit of one of petitioners' employees stating that, prior to the time Kuapa Pond was opened to Maunalua Bay, the Corps advised him that no permit was required for work in Kuapa Pond because it was "private." Once it was opened to the Bay, the Corps took the position that Kuapa Pond was a navigable water of the United States.

Once Kuapa Pond was connected to the Bay and the Pacific Ocean, the Corps required a permit for any further work or structures in Kuapa Pond. In 1971 the Corps issued a permit authorizing Kaiser Aetna to build a fueling facility in or near Kuapa Pond (A. 40). In applying for this permit, Kaiser Aetna stated that it felt Kuapa Pond was not a navigable water of the United States, that a federal permit was unnecessary for work done in Kuapa Pond itself and that it sought a federal permit without conceding it was required (A. 43). On January 11, 1972, in response to Kaiser Aetna's position, the District Engineer wrote Kaiser Aetna that "[b]y virtue of this water being connected through improved channels to navigable waters, this pond is considered to be an integral element of the navigable waters of the United States. As such, permits under 33 U.S.C. 403 and within the meaning of the Rivers and Harbors Act of 1899 are required to work in Kuapa Pond"

(A. 38). The letter also stated: "This is to advise you that the requirements for permits for work in or discharge into the waters of Kuapa Pond will be strictly enforced" (*ibid.*). In October 1972, the Office of Counsel of the Corps of Engineers in Washington concurred in the District Court's determination that Kuapa Pond is a navigable water of the United States (A. 35).[6] Shortly thereafter, the United States Coast Guard also determined that Kuapa Pond is a navigable water of the United States calling it a "highway for interstate and foreign commerce" (A. 47-51).[6a] Kaiser Aetna, however, did not budge and refused to obtain federal permits for dredging and other work in Kuapa Pond (A. 13, 38, 39-40). Its patrol boats, moreover, intercepted "unlicensed" vessels entering Kuapa

[6] Petitioners state (Br. for Pet. 7) that "[a]lthough the Corps of Engineers was aware of the work in Kuapa Pond, it did not require permits until January 11, 1972." This is not so. A permit was issued in 1971 for a proposed fueling dock, as explained in the text. On May 4, 1971, petitioners' counsel objected to the Corps' statements that Kuapa Pond was "navigable waters of the United States" (A. 43). It was only because petitioners continued to refuse to apply for permits for dredging and maintenance in Kuapa Pond that the Corps explicitly warned Kaiser Aetna that Kuapa Pond was a navigable water of the United States and that the permit requirement would be strictly enforced (A. 38, 44).

[6a] The Coast Guard stated (A. 48, 50) that the "extensive use by recreational craft coupled with the navigational improvements made in the pond (channel dredging and establishment of aid to navigation system) indicate its capability for use by the public for purposes of transportation and commerce" and "[t]he waters of Kuapa Pond and the channel connecting it to the sea have been improved to the point where they constitute a highway for interstate and foreign commerce."

Pond from Maunalua Bay and advised their operators that Kuapa Pond could be navigated only by Kaiser Aetna's licensees (A. 8, 11, 36, 63).

2. On July 6, 1973, the United States commenced this action against petitioners in the district court seeking a declaration that Kuapa Pond is a navigable water of the United States and an injunction against petitioners' performing any further work therein without a federal permit or attempting to exclude the public from Kuapa Pond. The case was tried without a jury in 1975. On February 6, 1976, the district court held that Kuapa Pond is a navigable water of the United States and that petitioners were required to obtain permits for all dredging, maintenance of sea walls, and other work in Kuapa Pond. The district court held, however, that petitioners could lawfully exclude the public from Kuapa Pond (Pet. App. 13a-34a).

The district court found that Kuapa Pond covered approximately 523 acres, extended approximately two miles inland from Maunalua Bay, had an average depth of six feet with a main channel of eight feet (*id.* at 15a, 18a). The bridge over the main channel has a maximum clearance of 13.5 feet over mean sea level (*id.* at 18a).[7] A commercial shopping center, the Koko Marina Shopping Center, and residences abut Kuapa Pond (*ibid.*).

Every marina-lot lessee is entitled to a nonexclusive license to navigate Kuapa Pond; there are ap-

[7] For aerial photographs showing the size of Kuapa Pond and its relationship to Maunalua Bay, see Plaintiff's Exhibits 5-10.

proximately 1,500 such lots; 86 other residents in the development who do not abut the shoreline are licensed by the trustees to navigate Kuapa Pond, and at least 56 boat owners, who are nonresidents, are licensed to use Kuapa Pond (*id.* at 19a). Altogether 668 vessels have been licensed by petitioners to navigate Kuapa Pond (*id.* at 18a). The license fee in all cases is $72 annually (*id.* at 19a).

The trustees, as mentioned, reserved the right to license commercial vessels (Def. Exh. 13, ¶ 5(c)). For several years, they have permitted various commercial uses of the *Marina Queen*, a passenger vessel that can carry up to 25 persons (Pet. App. 18a-19a). During 1967-1972, Kaiser Aetna operated the *Marina Queen* primarily to show the development of prospective subdevelopers and purchasers of homesites. On Sundays the general public was invited to join the cruises (*ibid.*). During 1973, the merchants in the Koko Marina Shopping Center were licensed to operate the *Marina Queen* six or seven times daily for the purpose of attracting customers. The merchants sold excursion cruises on the *Marina Queen* and roundtrip bus rides between the marina and various points on Oahu to tourists and the general public for the package price of one and later two dollars (*id.* at 19a). During this period, 38,821 persons rode the *Marina Queen* (*ibid.*; A. 45-46).[8] When this promotion ended, petitioners made the *Marina Queen* available for other sales promotions (A. 22), and Kaiser Aetna used the

[8] Once transported by bus to the marine, passengers were entitled to the excursion cruise at no additional charge (A. 22).

Marina Queen on Kuapa Pond for the promotion of real estate sales (Pet. App. 19a). At the time of trial, the trustees had not yet decided whether they would license other commercial vessels (*id.* at 18a).[9]

The district court held that Kuapa Pond formed part of "the highways of commerce between different states or into foreign commerce" (*id.* at 29a-30a):

> Defendants did not restrict use of the marina just to residents of Hawaii-Kai as an exclusive appurtenant to their lot purchase agreements, to permit them to launch their private recreational crafts into the marina's private waters, and enter Maunalua Bay by means of an artificial channel from the marina to the bay. Rather, Kaiser-Aetna also sells licenses to nonresidents to use the facilities of the marina for launching and mooring their boats, as well as use the marina waters as a highway by which to gain the open sea through the channel. By so doing, defendants transformed what was apparently conceived as a private recreational area into a combination harbor and canal available to any boat owner who was willing to pay the fee, subject only to the total use-capacity of the marina. Thus the marina is in fact used in interstate commerce both to raise revenue for Kaiser-Aetna and to transport residents and nonresidents by waterway into and out of Maunalua Bay.

[9] In 1970, Kaiser Aetna had plans, which were later abandoned, to utilize part of the marina for a boat-rental concession (R. 257; A. 23). In addition, petitioners operate patrol boats seven days a week on Kuapa Pond (A. 8, 11, 36, 63). Until prohibited by Kaiser Aetna, a boat operated by a commercial scuba diving school collected students at the Hawaii Kai pier (A. 23).

Accordingly, the court held that "the waters of the marina cannot now be considered to be private property in and upon which its owners may do as they please without any possible federal regulation. As used by the defendants, the marina has become the legal equivalent of a toll-charging canal or harbor and therefore subject to regulation by the Corps of Engineers under § 10 of the Rivers and Harbors Act" (*id.* at 30a-31a). That navigation on Kuapa Pond was possible chiefly through private effort did not matter. The court noted "[f]ederal admiralty jurisdiction has long been held to apply to artificial waterways that in fact form highways of commerce between different states or into foreign commerce, over which vessels actually pass * * *." The court therefore enjoined petitioners from dredging or otherwise performing work in Kuapa Pond without federal permits.

The court held, however, that the public had no right to navigate Kuapa Pond. The court recognized that, even prior to its transformation, Kuapa Pond was subject to tidal fluctuations (see A. 55) and was therefore a navigable water of the United States under the ebb-and-flow test (Pet. App. 24a-25a).[10] It also held that the mere fact that petitioners dredged

[10] The government also contended that Kuapa Pond was a navigable water of the United States, even prior to the Hawaii-Kai development, because it was susceptible, through reasonable improvements, to use as a channel for interstate commerce under the test of *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940). The court did not reach this issue in view of its determination that the ebb-and-flow test was satisfied (Pet. App. 21a-24a).

Kuapa Pond at their expense would not convert public waters into a private marina (*id.* at 22a). Nevertheless, the public right of navigation normally applicable to navigable waters of the United States was superseded, in the court's view, by "the unique legal status of Hawaiian fishponds such as Kuapa Pond as strictly private property" (*id.* at 24a).

Under pre-territorial Hawaii law, the court noted, fishponds were regarded as private property (*id.* at 16a-17a, 25a). When Hawaii became a territory, the court stated, Section 95 of the Hawaii Organic Act of 1900, ch. 339, 31 Stat. 160, recognized fishponds as private property.[11] After statehood, state law continued to recognize fishponds as private property (Pet. App. 26a). The court held that when a state is admitted or a territory is annexed, private property may not be destroyed without compensation (*id.* at 27a).

The fact that the fishpond had been transformed into a navigable waterway did not, held the court, change its status as private property (*id.* at 31a-33a). Although the waterway was subject to "regulation" as a navigable water of the United States, the district court held that it was the equivalent of fast lands for purposes of public use and enjoyment. Only by condemning Kuapa Pond and paying compensation for petitioners' investment could the

[11] The cited provision stated:

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the seawaters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States * * *.

United States require that the public be admitted (*id.* at 32a).[12]

3. Both sides appealed. On the petitioners' appeal, the Ninth Circuit affirmed the injunction prohibiting any further work in Kuapa Pond without a federal permit (Pet. App. 9a). On the government's appeal, the Ninth Circuit held that the public right of navigation is co-extensive with the navigable waters of the United States, that Kuapa Pond is a navigable water of the United States, and that the public has a right to navigate it.

In the Ninth Circuit's view, it was immaterial whether Hawaii law recognized fishponds as private property. First, the court reasoned that "[e]ven fast land appurtenant to a waterway can by excavation be submerged and rendered a part of the waterway and should this occur the land loses its character as fast land and takes on the character of submerged land" (Pet. App. 10a). When the "fast lands" of Kuapa Pond were dredged and transformed into a marina, Kuapa Pond "took on the character of a waterway" (*id.* at 11a). Second, the Ninth Circuit observed that the federal power to regulate and the public right of navigation cannot be separated, for "[i]t is the public right of navigational use that renders regulatory control necessary in the public interest" (*ibid.*). Therefore, once the district court found that Kuapa Pond was a navigable

[12] The district court also held that the Corps was not estopped by its earlier "seeming indifference to the creation" of Kuapa Pond as a navigable waterway to assert the full extent of public rights and regulation (*id.* at 33a).

water of the United States and could be regulated in the public interest, it was error to exclude the public from the waterway. Third, the court held the federal navigational servitude is not imposed by the government in the nature of a seizure, but exists as a characteristic of all navigable waters of the United States (*ibid.*). Therefore, there is no need to pay petitioners "compensation" because there was no "taking" (*ibid.*). The Ninth Circuit reversed the judgment of the district court on this point and remanded for entry of judgment in favor of the United States (*id.* at 12a).

SUMMARY OF ARGUMENT

The public enjoys a federally protected right of navigation over the navigable waters of the United States. All parties to this litigation accept this principle. What is in dispute is whether Kuapa Pond is a navigable water of the United States. The traditional definition of "navigable waters of the United States" includes those waterways (i) which are in fact navigable or could be made so with reasonable improvements or which ebb and flow with the tide, and (ii) which by directly or indirectly connecting with other navigable waters form a continuous highway for navigation among the states. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940).

Kuapa Pond meets these tests. It ebbs and flows with the tide. It is quite large, opens directly to Maunalua Bay, is navigable in fact, used by at least 668 vessels, is more than capable of sustaining com-

merce and in fact does so. For example, the trustees have licensed local merchants to sell excursion cruises to the public on Kuapa Pond. Petitioners have expressly reserved the "right" to license still more commercial vessels in Kuapa Pond. As the district court found, moreover, petitioners operate a commercial harbor within Kuapa Pond. Kuapa Pond is, therefore, a navigable water of the United States.

Petitioners insist that the navigability of Kuapa Pond must be determined by looking to its characteristics *before* it was made an integral part of Maunalua Bay. They claim that, in those days, Kuapa Pond was not navigable. They then argue that as a matter of law, it did not become navigable, merely because petitioners deepened it and opened it to the sea "at extraordinary private expense." Petitioners' argument, however, stumbles on both points. Even before its transformation, Kuapa Pond was a navigable water of the United States. It was subject to tidal fluctuations. It was also susceptible to use as a highway of navigation and commerce through reasonable improvements. Its actual improvement for navigation is proof enough of that. In any event, even if it was not navigable before, it certainly is today. The fact that the conversion was accomplished at private expense does not exempt Kuapa Pond from the navigable waters of the United States. To allow landowners to dredge their fast lands and reshape the navigable waters of the United States to more conveniently serve their land, and then to exclude the public from the navigable portions flowing over the site of the former fastlands, would unduly burden

navigation and commerce. The states lack the power under the Commerce Clause to sanction any such form of private property, as we have explained in more detail in our brief as amicus curiae in the companion case, *Vaughn* v. *Vermilion Corp.*, No. 77-1819.

The reach of the public navigational servitude is a federal question and cannot be controlled by state law. Petitioners argue that in Section 95 of the Hawaii Organic Act, ch. 339, 31 Stat. 160, Congress effectively exempted fishponds and artificial enclosures used for fisheries in Hawaii from the public navigational servitude. There is, however, no basis for so reading the Act.

Section 95 did not surrender the public navigational servitude with respect to fishponds dredged and opened to the sea for the purpose of navigation. At most, the provision was meant to protect private licenses, recognized under state law, to take fish from enclosed fishponds used in Hawaii's unique form of aquaculture. It was never intended to regulate navigation on waterways that were integral parts of the navigable waters of the United States.

There is likewise no merit to the claim that the exercise of the public navigational servitude constitutes a taking of property without just compensation. The essence of the servitude is that it supersedes any state-created property interest in the navigable waters of the United States. A proper exercise of a superior right, such as the public right of navigation, does not require compensation for subordinate rights.

It is true that the servitude does not extend to fast lands. But, even if Kuapa Pond once qualified as fast lands, it lost that status when its owners voluntarily dredged the area and reshaped the navigable waters of the United States to better suit their land. With this change, the public acquired an interest in maintaining the navigable waters of the United States, including the former fishpond, as a continuous highway for navigation and in avoiding the burdens to navigation that are created by petitioners' attempt to reserve the waterway to themselves. If owners of fast lands do "not wish to submit themselves to such interference, they should not * * * clothe[] the public with an interest in their concerns." *Munn* v. *Illinois*, 94 U.S. 113, 133 (1876). Having dedicated their property to a use that implicates the public interest, petitioners may not complain that the accompanying servitude constitutes a taking.

ARGUMENT

I. The Public Enjoys A Federally Protected Right Of Navigation Over The Navigable Waters Of The United States

It has been common ground among the parties to this suit (and the courts below) that the public enjoys a federally protected right of navigation over the navigable waters of the United States. (See Br. for Pet. 11, 14, 28, 32-38.) The sources of this right are explained in our brief as amicus curiae in *Vaughn* v. *Vermilion Corporation*, No. 77-1819, at

10-27.[13] In short, the public navigational servitude on all navigable waters was adopted by the Colonies as part of their common law. When the Constitution was adopted, the states, by agreeing to the Commerce Clause, surrendered their power to eliminate the servitude by conferring on private monopolies the right to navigate such waterways. Were the rule otherwise, navigation would be severely impeded. Vessels would be, or could be, required to obtain licenses from every "owner" of the surface use of navigable waters recognized under local law.[14] The same principles apply to later-admitted states by virtue of the equal-footing doctrine. Petitioners accept this basic principle.

---

[13] We are serving petitioners with a copy of our brief in *Vaughn*.

[14] In addition to the authorities cited in our brief in *Vaughn*, see *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 436, 452-460 (1892), holding that the State of Illinois lacked the power to convey title to the bed of navigable waters within its jurisdiction save for the purpose of erecting aids to navigation. The Court invalidated an attempt by Illinois to convey certain tidelands to the railroad because such lands were held in public trust for the benefit of navigation and in the interest of "commerce." *Id.* at 452. "The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it." *Id.* at 458 (citing with approval *People* v. *New York & Staten Island Ferry Co.*, 68 N.Y. 71, 77 (1877)). See also *Morris* v. *United States*, 174 U.S. 196 (1899); *United States* v. *Mission Rock Co.*, 189 U.S. 391, 406 (1903); *West Chicago R.R.* v. *Chicago*, 201 U.S. 506, 524 (1906); *Pigeon River Co.* v. *Cox*, 291 U.S. 138 (1934).

II. Kuapa Pond Is A Navigable Water Of The United States

As explained at pages 27-28 of our brief in *Vaughn*, "navigable waters" are those (i) which are in fact navigable or could be made so with reasonable improvements or (ii) which ebb and flow with the tide. "Navigable waters of the United States," as opposed to those of the states, are navigable waters which directly or indirectly connect with navigable waters over which commerce is or could be carried on with other states or foreign nations. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940).

Kuapa Pond fully meets these tests. It ebbs and flows with the tide (A. 53). It is navigable in fact. Used by at least 668 vessels, it is more than capable of sustaining commerce,[15] and in fact does so. The trustees have licensed local merchants to sell excursion cruises to thousands of passengers drawn from the general public and have specifically reserved the right to license other commercial vessels. Petitioners, moreover, operate a commercial "harbor" within Kuapa Pond "available to any boat owner who [is] willing to pay the fee * * *" (Pet. App. 29a). Although it lies wholly within a single state, Kuapa Pond physically connects with waters leading to other states and foreign nations and constitutes, as the Coast Guard observed, "a highway for interstate and foreign commerce" (A. 50). These characteristics satisfy every traditional definition of a navigable water of the United States.

[15] As mentioned at page 7, *supra*, Kuapa Pond extends two miles inland at an average depth of six feet, is connected to Maunalua Bay by a channel 200 feet wide and eight feet deep. Use is not limited to local residents. At least 56 nonresidents are "licensed" to use Kuapa Pond. Altogether, at least 668 vessels are licensed to navigate Kuapa Pond.

Petitioners do not dispute our conclusion that Kuapa Pond meets the traditional definition of the navigable waters of the United States. Petitioners instead essentially argue (a) that prior to its transformation, Kuapa Pond was not a navigable water of the United States, and (b) that it did not become a navigable water of the United States by virtue of their "extraordinary private effort." At all times, therefore, petitioners conclude that Kuapa Pond has been the equivalent of fast lands. We now consider these points in turn.

A. *Prior To Its Conversion To A Harbor And Canal, Kuapa Pond Was A Navigable Water Of The United States*

The district court found that, even prior to its transformation, Kuapa Pond satisfied the ebb-and-flow test for navigability and therefore, but for "unique" local law making fishponds private, would have been subject to public navigation (Pet. App. 24a-25a). Although we disagree that state property law may determine the extent of the federal right to navigate, see *United States* v. *Oregon*, 295 U.S. 1, 14 (1935), we endorse the district court's holding that even before its transformation Kuapa Pond was part of the navigable waters of the United States.

Petitioners contend the Court abandoned the ebb-and-flow test of navigability in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). We disagree. There, the Court observed that in England the common-law test of navigability was the ebb-and-flow test. This test was not, however, "any test at all" of the full extent of waters navigable in this country in view of the many inland rivers that are unaffected by the tide. The Court therefore held that the navigable waters of the United States also included waters that were navigable in fact. However, the Court did not hold that waters subject to tidal fluctuations were no longer navigable.[16]

In any event, Kuapa Pond in its natural state satisfied the navigable-in-fact test. In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 408-418 (1940), the Court held that the New River was a navigable water of the United States. The Corps of Engineers and the lower courts had concluded it was not navigable because of its swiftness, mountainous

[16] Pursuant to its mandate to regulate dredging, filling and other work in the navigable waters of the United States under 33 U.S.C. 403, the Corps of Engineers has asserted jurisdiction over tidelands solely under the ebb-and-flow test. See 33 C.F.R. 322.2, 42 Fed. Reg. 37139 (1977); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *United States* v. *Cannon*, 363 F. Supp. 1045 (D. Del. 1973); *United States* v. *Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973); *United States* v. *Baker*, 2 E.R.C. 1849 (S.D. N.Y. 1971); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971); *Tatum* v. *Blackstock*, 319 F.2d 397 (5th Cir. 1963). See also Kramon, *"Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes,"* 33 Md. L. Rev. 229 (1973).

bed, rapids, falls, and numerous other obstructions. *Id.* at 418. The Court reversed. "To appraise the evidence of navigability only on the natural condition of the waterway is erroneous," observed the Court, for "[a] waterway otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." *Id.* at 407. Therefore, in determining the navigable character of the river, it was proper, the Court held, to consider whether navigation on the river would be feasible after reasonable improvements. The Court stressed, however, that it was not "necessary that the improvements should be actually completed or even authorized." *Id.* at 407-408.

In its natural state, Kuapa Pond satisfied this test. Partial removal of the barrier beach and dredging of the bed would have opened Kuapa Pond to navigation from the sea. That petitioners have done this is evidence enough that it was practical to do so. It makes no difference that petitioners did it to benefit residents and local merchants. All government navigation projects largely benefit persons and businesses in their immediate vicinity.

Petitioners insist (Br. for Pet. 44) that there was no public "need" to open Kuapa Pond to the sea and that this defeats navigability. Not so. *Appalachian Power* makes it clear that the test is whether the water *could* be improved for public navigation, not whether it should be. (In fact, in *Appalachian Power*

the Corps had effectively determined that the New River should not be developed for public navigation.)[17]

We do not press the point, however. In this case it is unnecessary to resolve the question whether the public enjoyed a theoretical right to navigate in Kuapa Pond before its transformation. The present dispute relates only to public access after Kuapa Pond had ceased to be a shallow fish pond, effectively cut off from the sea, and had, by deepening and breaching of the seawall, become an obviously navigable body of water, fully accessible to Maunalua Bay and the ocean.

B. *Assuming Arguendo that Kuapa Pond was Not Previously Navigable, Its Conversion To A Marina And Channel To the Sea Made It A Navigable Water of the United States*

Assuming, for the sake of argument, that Kuapa Pond was not navigable before its transformation, it became navigable after it was deepened and opened to the sea. Petitioners do not deny that it is now

[17] Petitioners cite (Br. for Pet. 43-44) several decisions for the view that waters usable in their natural condition only by shallow-draft boats are not navigable. All but one of these decisions, however, were decided well before *Appalachian Power* made it clear that susceptibility of the stream to navigation must be considered, not merely based on the natural condition of the stream, but with reasonable improvements. The cited decision after *Appalachian Power* is not inconsistent with *Appalachian Power*. *Pitship Duck Club* v. *Town of Sequim*, 315 F. Supp. 309 (W.D. Wash. 1970), in holding that a lagoon was not navigable, found that it could not be reached from navigable waters "[m]ost of the time during each day," that there had never been commercial traffic over the lagoon, and that dredging the lagoon to admit such traffic would be "economically unfeasible." *Id.* at 310.

navigable and connects with other navigable waters of the United States. They contend that Kuapa Pond must be deemed non-navigable in law because it is an "artificial" extension of the navigable waters of the United States made navigable in fact solely through "extraordinary private effort." [18]

This argument is identical to the argument made by respondents in *Vaughn* and our response is no different. First, as we explained at pages 30-34 of our brief in *Vaughn*, it does not matter whether a navigable reach of the navigable waters of the United States is an "artificial" or a "natural" component. To permit such a distinction to determine public access would reintroduce the very evil that the navigational servitude is designed to avoid and would impose an intolerable burden on navigation. The navigable waters of the United States form a continuous highway of water. When a vessel approaches a "connecting" inlet, it is not always easy to tell whether it is natural or artificial or partly both. The public cannot be expected to know whether the inlet was once non-navigable (and therefore still is private, under petitioner's view) or has always been a natural

[18] Petitioners are correct (Br. for Pet. 28-43) that the scope of congressional power to regulate commerce is broader than the scope of the navigational servitude. The navigational servitude covers only the navigable waters of the United States. Regulatory power may extend beyond navigable waters to non-navigable waters or to fast lands. Our submission does not depend on "extending" the servitude beyond the navigable waters of the United States, as petitioners seem to assume. The servitude applies to Kuapa Pond because it is a navigable water of the United States.

inlet (open to the public), or is a stream rendered navigable through reasonable improvements (and therefore open to the public).

Similar problems are presented by the submersion of the barrier walls that fenced in fishponds. A fishpond of the *loko-kuapa* type was created along the beach by building a sea wall in the ocean in an arc shape. Natural accretion or erosion of the sea wall, however, may result in the complete submersion of the sea wall.[19] To the public, the waters will appear undisturbed. In such circumstances the public could not possibly be expected to know, under petitioners' theory, where the public right to navigate ends and the private monopoly begins. These practical obstacles to navigation are avoided by refusing to carve out an exception to the rule of free access to all waters that form part of the continuous highway of water connecting the states. If exceptional circumstances warrant a restriction on public access to any specific waterway, the Secretary of the Army is empowered to issue a regulation, after public hearing, just as the Corps has done in restricting access near or at military facilities.[20] See 33 U.S.C. 1 and 33 C.F.R. Part 207.[21]

---

[19] See *In re Kamakana*, 58 Haw. 632, 634 n.2, 574 P.2d 1346, 1347 n.2 (1978); and page 28, *infra*.

[20] 33 U.S.C. 1 authorizes the Secretary of the Army to "prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property * * *."

[21] By explicit command of statute, moreover, private improvement of navigable waters opens them to toll-free passage. Section 1 of the Rivers and Harbors Act of 1902, ch. 1079, 32 Stat. 371, 33 U.S.C. 565, provides that individuals or corporations may improve navigable streams at their "own expense and risk" upon the approval of the plans by the Corps of Engineers. The improvement, however, "*must not impede navigation, and no toll shall be imposed on account thereof, and said improvement shall at all times be under the control and supervision of the Secretary of the Army and Chief of Engineers*" (emphasis added). Section 565 was intended to allow local interests to improve navigable waters for the benefit of the public without having to wait for congressional appropriations. 35 Cong. Rec. 3141 (1902). In doing so, however, the public right of navigation was not to be abridged merely because the improvement was privately financed. Here, two waterways might be said to have been improved by petitioners' project. Kuapa Pond and the waters that run through it were improved. Maunalua Bay was also improved by extending access to Kuapa Pond. In either event, petitioners may not condition public navigation on payment of a toll, as they themselves admit they have been doing. (Br. for Pet. 56). (Section 565 was qualified slightly in the Water Resources Development Act of 1976, Pub. L. No. 94-587, Section 155, 90 Stat. 2917. Section 565 no longer applies to privately built wharves and piers in certain navigable waters wholly within a single state. See 33 U.S.C. 59(1).

As mentioned, our argument on this issue parallels our argument in *Vaughn*. Just as the Louisiana fast lands used to build Vermilion's canals became subject to the navigational servitude when the canal system was opened to the navigable waters of the United States, so the Hawaii "fast lands" (assuming they ever were fast lands) became subject to the servitude when Kuapa Pond was dredged and opened to the sea.[22] To avoid this conclusion, petitioners ad-

---

[22] *Veazie* v. *Moor*, 55 U.S. (14 How.) 567 (1852), cited by petitioners, held only that there is no federal right to navigate local waters which are not part of the navigable waters of

vance two additional arguments. First, they assert that a "unique" combination of state and federal laws preclude any right of navigation on Kuapa Pond. Second, petitioners argue that the exercise of the public right of navigation on Kuapa Pond is an uncompensated "taking" of private property. As we now explain, neither point has merit.

III. Neither Federal Nor State Law Recognizes Any Private Right To Exclude The Public From Kuapa Pond

The reach of the public navigational servitude under the Commerce Clause is a federal question, not governed by local law. See *United States* v. *Oregon*, 295 U.S. 1, 14 (1935). In the exercise of its power to regulate navigation and declare that certain waters shall not be deemed to be navigable waters of the United States, Congress may withdraw the federal right of public navigation from those waters. See, *e.g.*, 33 U.S.C. 21-59(k). But, without congressional authorization, the states may not attempt to supersede the public right of navigation by conferring exclusive monopolies on navigation. Accordingly, petitioners contend (Br. for Pet. 45) that Section 95 of the Hawaii Organic Act, ch. 339, 31 Stat. 160, which organized Hawaii as a territory, constituted such a "surrender." Section 95 provided:

---

the United States. *Veazie* did not hold that the servitude is inapplicable to artificial extensions of navigable waters of the United States. In *Veazie*, the river was entirely within the State of Maine and the reach of the river in question was separated from the Atlantic by four dams and impassable falls. It therefore did not form part of a continuous highway of commerce to other States. Nor was it subject to tidal fluctuations. *Id.* at 571.

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii *not included in any fish pond or artificial inclosure* shall be free to all citizens of the United States * * *. [Emphasis added.]

Petitioners argue that the italicized language prevented the attachment of any public right of navigation to fishponds and artificial enclosures. In our view, this contention is groundless for a number of reasons.

1. The basic premise of petitioners' Section 95 argument is that prior Hawaii law—allegedly confirmed by the Organic Act—recognized a right in the owners of fishponds to exclude public navigation. But no such state law rule has been shown.[23]

Petitioners devote considerable effort to establishing what we do not contest—that Hawaii law recognizes a private right of fishery in enclosed fishponds and generally treats fishponds as improvements appurtenant to the land. Petitioners, however, point to no state decisions holding or even suggesting that the public does not have a right to access to former fishponds opened to the sea for the purpose of navigation. We believe, for two reasons, that Hawaii law looks the other way.

---

[23] We note that Section 95 is no longer federal law. Although the provision survives as Article X, Section 3, of the Hawaii Constitution, it was repealed as part of the laws of the United States by the Statehood Act of 1959, Pub. L. No. 86-3, Section 15, 73 Stat. 11.

First, the reason fishponds were treated as private property derived from their vital role as a peculiar form of Hawaiian aquaculture. In 1848, King Kamehameha III pronounced the Great Mahele, a national land distribution under which large land units (*ahupuaas*) were allotted to his chiefs (Pet. App. 3a-4a, 17a). An *ahupuaa* generally ran from the mountain to the sea and included any fishponds within its boundaries (*id.* at 17a). It afforded the chief and his people access to fisheries at the seaside as well as the products of the highlands, such as fuel, canoe timber, and mountain birds and game. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-241 (1879).

Fishing was a vital occupation for a chief and his people, and customs and laws regulated the allocation of fishing rights among the chief, the people, and the King. See *Carter* v. *Hawaii*, 14 Haw. 465, 470-473 (1902). Anyone was permitted (after 1839) to fish in the ocean outside the coral reefs (*id.* at 471), but only the landlord and the tenants could fish inside the reef or in fishponds within the *ahupuaa* (*ibid.*). Fishponds were of three types: (a) *loko wai* —inland fresh-water ponds normally at an elevation higher than sea level; (b) *loko kuapa*—shallow ponds formed by building a stone wall into the sea to create an artificial enclosure; and (c) *loko pu'u*—shallow ponds formed by a natural sand beach between the pond and the sea (Tr. 65-66).[24]

[24] "Tr." refers to the reporter's transcript of the proceedings in the district court on November 19, 1975.

Kuapa Pond, prior to its transformation into a marina and boating area, was essentially of the last type, though the use of a stone wall to reinforce its natural sand bar accounted for its name (Pet. App. 15a-16a & n.3; Tr. 67-69). Since mullet did not spawn in the fishpond, they were caught outside the pond and planted within it as seed (Tr. 70). The sluice gates allowed spawn to flow in and out of the pond but did not allow large fish to leave. Fish were harvested in the pond with the aid of shallow-draft canoes (Pet. App. 16a).

Fishponds thus contained cultivated crops, and it is understandable that Hawaii law recognized the exclusive right of the cultivators to reap their harvests by excluding the public from such ponds and treated fishponds as improvements appurtenant to the land, as petitioners observed. See *In re Kamakana*, 58 Haw. 632, 640, 574 P.2d 1346, 1351 (1978); *Harris* v. *Carter*, 6 Haw. 195 (1877). However, once a fishpond is no longer used to harvest fish, is transformed to a marina, and is joined with the sea, the reasons for excluding the public no longer apply. "The rule follows where its reason leads; where the reason stops, there stops the rule." K. Llewellyn, *The Bramble Bush* 157-158 (1960). Although there is no decision in point, Hawaii property law seems to hold that a pond remains private only so long as it remains completely enclosed. See *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915) ("[W]hen one captures fish in the public waters and confines them in a private pond, disconnected from the public waters, he acquires an absolute property in them * * *").

Second, Hawaii law clearly recognizes a public right of navigation on all navigable waters in Hawaii. *King* v. *Oahu Ry. & Land Co.*, 11 Haw. 717, 725 (1899); *McBryde Sugar Co.* v. *Robinson*, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973), cert. denied, 417 U.S. 976 (1974); *Bishop* v. *Mahiko*, 35 Haw. 608, 647 (1940); *Carter* v. *Hawaii*, 14 Haw. 465, 470 (1902). In light of this policy, it is doubtful that the Hawaii courts—if faced with the issue—would exclude the public from fishponds opened to the sea for the purpose of navigation.[25]

[25] Of the Hawaii cases cited by petitioners (Br. for Pet. 17-23) only two arguably bear on any aspect of ownership of unenclosed fishponds. *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915), supports our view that the exclusive right to fish in a fishpond exists only so long as the pond is "disconnected from the public waters." *In re Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978), held that a fishpond had been patented to the private landowners' predecessors and therefore title had not remained in the State. Although there are suggestions in the opinion that the fishpond is now in dilapidated condition and no longer used for aquaculture, as petitioners argue, the decision addresses only the issue of bed title, and does not consider whether or not such title is burdened with a servitude in favor of public navigation. We do not contend that title to the beds of fishponds is public property.

The only two state attorney general's opinions on the general subject are inconclusive. The 1939 opinion of the Attorney General of Hawaii cited by the district court (Pet. App. 25a n.2) states that "[t]he status of ancient fish ponds fronting on the sea various ahupuaas and ilis have [*sic*] not been decided as yet by our highest court." Hawaii Attorneys General Opinions No. 1689 at 461 (1939). The 1957 opinion of the Hawaii Attorney General, No. 57-159 (Pet. 8-9), does state that a breach in the sea wall of a fishpond would entitle vessels in distress to trespass in times of emergency, a point that need not be made if the waters are deemed public anyway. But neither opinion, and no previous case of which we are aware, holds that the public right of navigation does not apply to a fishpond that has been deliberately opened to the sea for navigation purposes, as in this case.

2. There is, in any event, no basis for concluding that the Congress of 1900 was adopting as federal law any local rule that restricted the normal scope of the public navigational servitude.

First, the intent of Congress in Section 95 was "to destroy, so far as it is its power to do so, all private rights of fishery and to throw open the fisheries to the people." *In re Fukunaga*, 16 Haw. 306, 308 (1904); *State* v. *Hawaiian Dredging Co.*, 48 Haw. 152, 187, 397 P.2d 593, 612 (1964). Congress intended to open all sea waters to the public with the limited exception of fishponds and other enclosed waters, since they were used for aquaculture. Once the cultivation of fish ceases and the enclosure is breached for connection to the sea, the reason for the exception vanishes and the reasons for the rule of universal access apply.

Second, "[t]he general purpose of [Section 95] and of the following sections, 96 and 97, [was] to put the fisheries of the Hawaiian Islands upon the same basis as those of the United States." H.R. Rep. No. 305, 56th Cong., 1st Sess. 24 (1900). This congressional statement (which is the only statement in the House or Senate Report regarding the relevant language) refutes the notion that Congress intended to treat Hawaiian fishery rights differently from

fishery rights in the rest of the United States. It suggests, on the contrary, an intention to establish in Hawaii the traditional public right to access to the navigable waters of the United States. Thus, once Kuapa Pond ceased to be used as a fishpond and was connected to the sea, it joined the system of navigable waters to which all the public have a right to access.

Third, Section 95 addressed only the right of fishery, not the public right of navigation. See Report of the Committee on Fisheries, appended to The Report of the Hawaiian Commission, S. Doc. No. 16, 55th Cong., 3d Sess. 93, 94 (1898); Investigation of the Fisheries and Fishing Laws of Hawaii, H.R. Doc. No. 249, 57th Cong., 1st Sess. 19, 23-24 (1902) (Report of the Commissioner of Fish and Fisheries pursuant to Section 94 of the Hawaii Organic Act). Insofar as Section 95 granted a public right of fishery, as in virtually all sea fisheries, it necessarily implied a right of access. The converse, however, is not true. Recognition of private rights of fishery in fishponds (and in some sea fisheries) did not necessarily exclude public navigation consistent with the right of fishery.

Finally, whether or not Congress conferred a private right of navigation as well as a private right of fishery, Congress limited the exclusive right to "artificial inclosures" and "fishponds," which, as we have seen, are artificially or naturally enclosed. This was no accident, for it was evident to Congress that the enclosed fisheries were essentially "farms" for the planting, cultivation, and harvesting of fish. It was

equally evident, as it is now, that once the enclosure is opened to the sea, fish will come and go. For the same reason that Hawaii law would, we suggest, not be extended beyond its purpose, the exception for "fishponds or artificial inclosures" in Section 95 should not be extended to unenclosed waters which are really part of the sea.[26]

IV. Exercise Of The Public Navigational Servitude Is Not An Unconstitutional Taking Of Property

There is no merit to petitioners' claim (Br. for Pet. 52-64) that the exercise of the public navigational servitude amounts to a taking of property without just compensation. Without question, state law normally defines the extent of property interests. See *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). The whole point of the federal servitude, however, is that it supersedes any state-created property right in the navigable waters of the United States. All such state interests are "subordinate to the public right of navigation." *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913); *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82, 87 (1913). *Gilman* v. *Philadel-*

---

[26] Petitioners suggest *Damon* v. *Hawaii*, 194 U.S. 154 (1904), and *Carter* v. *Hawaii*, 200 U.S. 255 (1906), held that "unique" local laws may supersede the navigational servitude. These decisions merely held that a state license to take fish from a sea fishery, vested under pre-annexation law, could not be taken by the state under Sections 95 and 96 of the Organic Act without payment of compensation. They do not remotely address the public right of navigation across former fishponds transformed to marinas and joined with the sea.

phia, 70 U.S. (3 Wall.) 713, 724-725 (1865). The exercise of the servitude by the public or by Congress, within the confines of the navigable waters, is paramount to any state-created interest in the waters. Such an exercise, therefore, "takes" no property, even though it may adversely affect riparian owners.

Thus, even though local property laws recognize a right of a riparian owner to consume water from the navigable stream, see *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950) (majority and concurring opinions); or confer a riparian right of navigational access to the stream, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); *Gibson* v. *United States*, 166 U.S. 269 (1897); or grant a right to unspoiled oysterbeds, *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82 (1913); or confer certain rights in the flow of a stream, see *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956), such state-created rights exist subject to the exercise of the federal navigational servitude, as the Court has observed in these and many other no-compensation cases. See pages 20-21 of our brief in *Vaughn*.[27]

It is true that compensation must be paid if non-navigable waters or fast lands are taken for public

[27] Of course, Congress may agree to pay compensation for the taking of state-created water rights. See *Henry Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930) (Section 27 of the Federal Water Power Act preserved state-created water rights); *United States* v. *Gerlack Live Stock Co.*, 339 U.S. 725 (1950) (Section 8 of Reclamation Act of 1902 preserved state-created water rights).

use. This principle, of course, is wholly inapplicable here if, as we have argued, Kuapa Pond was a navigable water of the United States even before its transformation. See pages 19-22, *supra*. Nor is the prohibition against uncompensated taking of fast lands violated if we assume that Kuapa Pond was the legal equivalent of fast lands before its conversion. On that hypothesis, the Pond became part of the navigable waters of the United States, and subject to the public servitude, only after the owners—not the Government—undertook its transformation. Thus, the opening to public use was the consequence of the proprieters' action, not of any governmental "taking".

Fast lands are not "taken" when the owner voluntarily dredges them to allow the navigable waters of the United States to flow in. The Court has long held that when an owner of property uses it in a way that affects the public interest, it is subject to regulation and that such regulation, even if it interferes with the full enjoyment of the property, is not a "taking." *Munn* v. *Illinois*, 94 U.S. 113, 130-133 (1876). *Nebbia* v. *New York*, 291 U.S. 502, 531-536 (1934); *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 569-571 (1939); *Bowles* v. *Willingham*, 321 U.S. 503, 517-518 (1944); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 163-169 (1958); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258-261 (1964). As the Court observed in *Munn* v. *Illinois*, *supra*, 94 U.S. at 133, if the owners of such property do "not wish to submit themselves to such interference, they should

not * * * clothe[] the public with an interest in their concerns."

The public has an interest in maintaining the navigable waters of the United States as a continuous highway for commerce and navigation and in avoiding the uncertainties and burdens to navigation that would be posed a rule making "artificial" extensions of the navigable waters "off limits." As in *Munn*, the owners of fast lands are not required to dredge them and shape the navigable waters of the United States more conveniently about their land. But, if they do, they may not complain that the servitude accompanying those waters is a "taking" of their land. See also *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union* v. *Logan Valley Shopping Plaza*, 391 U.S. 308 (1968); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972).[28]

---

[28] Petitioners' voluntary extension of the navigable waters of the United States over their land is also a complete answer to their theory that the United States is bound to honor pre-annexation titles to fishponds. See *Knight* v. *United States Land Association*, 142 U.S. 161, 182-185 (1891); *San Francisco* v. *Le Roy*, 138 U.S. 656, 670-672 (1891). Even if Kuapa Pond were, by virtue of its preannexation lineage, regarded as the legal equivalent of fast lands, the fact remains that fast lands may be voluntarily subjected to the navigable waters of the United States. *Knight* and *Le Roy* are not to the contrary. Those decisions merely held that private title to the beds of navigable waters remained private after annexation and did not pass to the United States. Those decisions did not address the right of public navigation. Nor did they in any way suggest that private fast lands remain private after they

Finally, petitioners' analogy to *Monongahela Navigation Company* v. *United States*, 148 U.S. 312 (1893), is not apt. There, "at the instance and implied invitation of Congress," a private company constructed a lock and dam on the Monongahela River and collected tolls for private profit under a state franchise. *Id.* at 334. When the United States later took control of the improvement, the Court held that the United States was not, by virtue of its invitation to construct the works, in a position to deny just compensation. In subsequent no-compensation decisions under the navigational servitude, the Court held that *Monongahela Navigation Company* rested on the principles of estoppel. See, *e.g.*, *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, *supra*, 229 U.S. at 89-90; *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251, 264 (1915); *United States* v. *Rands*, 389 U.S. 121, 126 (1967), see also *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 513-514 (1923). No analogous invitation to improve Kuapa Pond was ever issued here by the United States. Nor, the district court found, was there any estoppel (Pet. App. 33a). Al-

---

are dredged so that the navigable waters of the United States may flow in.

Moreover, even assuming that pre-annexation Hawaii law recognized a right to exclude public navigation on enclosed fishponds, such a restriction would not survive annexation. Even enclosed fishponds, after annexation, would be subject to the public right of navigation so long as they were navigable waters of the United States. Cf. *United States* v. *Texas*, 339 U.S. 707, 712-713 (1950). *Knight* and *Le Roy* held only that pre-annexation titles must be respected after annexation, not that land titles may not be subjected to servitudes.

though petitioners stated their view in a letter to the Corps that the public could be excluded from Kuapa Pond, the United States at no time, so far as the record discloses, ever affirmatively confirmed this. See *Louisville Bridge Co.* v. *United States*, 242 U.S. 409 (1917); cf. *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973). At all events, 33 U.S.C. 565, enacted in 1902 after *Monongahela Navigation Company*, eliminates any possibility of an estoppel. It provides that private improvements to navigable streams must remain toll-free to the public and remain subject to the control and supervision of the Corps of Engineers. Petitioners claim (Br. for Pet. 56) that they "charge maintenance fees, similar to tolls," for use of Kuapa Pond. This is precisely what Section 565 forbids. See note 21, *supra*.[29]

[29] As petitioners note (Br. for Pet. 30), a 1930 opinion of the Attorney General of the United States did state that Congress could not take over "complete control" of an "entirely artificial" canal without paying compensation. But the opinion also stated that one who makes improvements to navigable waterways "takes the chance that the United States may conclude to exercise its paramount authority under the Commerce Clause * * *," and that such improvements may be completely appropriated without compensation. 36 Op. Att'y Gen. 203, 213, 214 (1930). Kuapa Pond, of course, is not an artificial but a natural body of water (see Pet. App. 8a-9a). And whether or not the United States could appropriate the waterway to its exclusive use, all the United States has done by virtue of the court of appeals' decision here is prevent the obstruction of public navigation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

RAYMOND N. ZAGONE
KATHRYN A. OBERLY
MARTIN GREEN
Attorneys

JUNE 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294722 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
810 Richards Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
ROBERT BRUCE GRAHAM, JR.
HAMILTON, GIBSON, NICKELSEN, RUSH & MOORE
20th Floor Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

REPLY TO STATEMENT

The Statement of the Government with respect to Kuapa Pond's history conveys a simplistic and misleading impression of the facts. Correction is essential to enable the Court to resolve this case in accurate perspective.

While Kuapa Pond was used for centuries for raising mullet, its owners do not, as the Government implies, possess only a license to raise fish. Beginning in 1848,

the Great Mahele granted private titles to fish ponds "to the same extent and in the same manner as rights were recognized in fast land" (Pet. App. 17a). The Trustees hold undisputed title to Kuapa Pond dating from the Hawaiian Monarchy, and have consistently maintained it as private property, excluding the general public (App. 29-30). No public navigation servitude was ever exercised over its waters (Pet. App. 28a).

The Government also omits mention of the pond's material physical characteristics. In its natural condition, it was a shallow inland water body used only by flat bottom boats and was isolated by a prehistoric barrier beach which prevented boat traffic to the open sea (Pet. App. 15a; Tr. 9-10; App. 30-31).[1] It has always been a distinct, independent water body.

The Government's Statement with respect to Kuapa Pond after Petitioners' improvements is even more misleading. Kuapa Pond is not a burgeoning commercial harbor. It was improved for recreational use in conjunction with a marina-style residential community (App. 31). The primary activities in the pond today are sailing, boating, swimming and fishing (App. 62, 39-40). Although the interior of the pond was dredged and filled, the seaward boundary has remained intact and no reshaping of navigable waters has resulted (*See* Attachment B to Defendants' Exhibit 36). This improvement was accomplished with and is presently maintained by private funds (App. 25-26; Defendants' Exhibit 31).

The depth of the pond, together with restricted clearance under the highway bridge over the entrance channel,

[1] All transcript ("Tr.") references are to the transcript of trial proceedings commencing on November 19, 1975.

negate any reasonable possibility of significant commercial use. The Marina Queen operation, upon which the Government places great emphasis, was terminated in early 1974. While in use, it traveled solely within the waters of the pond. It cannot realistically be viewed as a commercial passenger craft. (App. 22; Pet. App. 18a-19a, 28a-29a). The limited berthing privileges extended to certain nonresidents, upon payment of fees, were solely for recreational vessels.[2] Petitioners have never exercised their right to license commercial vessels (App. 21-22; Defendants' Exhibit 13, ¶ 5(c)).[3]

The Government also incorrectly asserts that it consistently maintained that Kuapa Pond became public navigable waters once a channel was dredged to adjacent Maunalua Bay. In fact, dredging began shortly after April 27, 1961 (App. 31). By the time the Corps of Engineers issued its report on Hawaiian Coastal waters in 1964, a channel had been completed and the report listed the pond as a *private* small craft marina (Defendants' Exhibit 16). In 1966, the channel was enlarged and improved. Because a permit for work in adjacent Maunalua Bay was necessary, the Corps was consulted and approved the plans, which reflected a 6.2 foot deep pre-existing channel (App. 48, 66-67, 56-60). Not until 1971, when Kaiser Aetna began plans to construct a fueling facility, did the Corps even suggest that Kuapa Pond was navigable (App.

[2] The evidence as to the nonresident boats is Court Exhibit 1 (App. 64-65). It provides no foundation for the broad conclusion that Petitioners transformed Kuapa Pond into a combination harbor and canal.

[3] The scuba diving operation to which the Government refers was terminated by Kaiser Aetna "immediately" after it learned about it (App. 23). No plans for a boat rental concession were ever implemented (*Id.*).

43, 40). Not until January 11, 1972, did the Corps formally take the position that Kuapa Pond was navigable (and then it demanded only that permits for work in the pond be obtained—it did not mention public access) (App. 44). Not until October 12, 1972, over ten years after improvements were begun, did the Corps officially determine Kuapa Pond to be a navigable water of the United States (App. 35).[4] In fact, the Corps did not consider Kuapa Pond to be navigable until after revision of its regulatory policies in response to environmental pressures of the early 1970's.[5] The Government cannot now contend that it has always considered Kuapa Pond to be public.

SUMMARY OF REPLY ARGUMENT

Kuapa Pond in its original condition was a Hawaiian fish pond which, under unique Hawaiian property concepts, is "the legal equivalent of fast land for property and 'navigation' purposes" (Pet. App. 28a). No public servitude or right of access has ever been recognized or exercised over its waters.

---

[4] The Coast Guard on February 27, 1973 issued its own determination of navigability (App. 47-51).

[5] The Corps' recent change of policy is documented by the radical revision of its regulations in 1972 (37 Fed. Reg. 18290-91 (1972), *codified* as 33 C.F.R. § 209.260, now § 329.8), from the traditional navigability-in-fact test of *The Daniel Ball*, 77 U.S. 10 (Wall.) 557, 563 (1871), as embellished by the reasonable improvement standard of *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940), to a much more encompassing standard extending jurisdiction beyond navigability-in-fact to nonnavigable tidal waters and certain private waters, among others. *Compare* Defendants' Exhibits 20, 21 and 22 *with* Defendants' Exhibits 23 and 24. This expanded assertion of regulatory power, to which the Corps alluded for the first time in its January 11, 1972 letter to Kaiser Aetna (App. 38), has been already documented (Br. for Pet., 28-43). The Government itself now specifically concedes that regulatory jurisdiction is not determinative of the public access question (Br. for U.S., 23 n.18).

The existence of unique private property rights is not subject to controversy. The Government's characterization of the property rights in fish ponds as no more than a license to take fish is untenable. Kings, courts and legislatures have always distinguished between rights in sea fisheries, by nature a license to take fish, and rights in fish ponds, by nature as absolute as title to fast land. While a sea fishery could coexist with public navigation, a fish pond is within the complete dominion and control of its owner, free from public navigation and incapable of forfeiture other than in ways common to all forms of real property. The unique private property rights in a fish pond therefore continue, even if the pond is no longer used to raise fish and even if it is open to the sea. *In re Application of Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978); Haw. Op. Att'y Gen. 57-159 (Dec. 12, 1957) (Defendants' Exhibit 9); Pet. App. 31a-33a.

The Government's repeated protests that state law cannot define the limits of the federal navigation servitude misstate the case. In both the Act of Annexation and in Section 95 of the Organic Act, the unique Hawaiian rights in fish ponds were *federally* recognized as vested pre-Annexation rights the United States was bound to respect under both domestic and international law. *See Knight v. United States Land Association*, 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy*, 138 U.S. 656, 670-72 (1891). One must resort to Hawaiian law to ascertain the extent of the vested right, but once a preexisting vested right has been established, it is protected by federal as well as state law. *Damon v. Territory of Hawaii*, 194 U.S. 154, 158 (1904); *Carter v. Territory of Hawaii*, 200 U.S. 255, 256-57 (1906).

Even under general federal navigation law, Kuapa Pond is a private body of water not subject to any public

navigation servitude. This Court has consistently distinguished between public navigable waters, which the national interest demands be preserved for free public use, and private fast lands and nonnavigable waters, which remain within the proprietary dominion of their private owners. *E.g., United States v. Cress,* 243 U.S. 316, 320-21 (1917); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 804-08 (1950).

The Government now accepts this settled distinction. It no longer maintains that all waters subject to regulation are *ipso facto* public (Br. for U.S., 23 n.18). It does argue, however, that Kuapa Pond was public navigable waters even in its natural condition or, in the alternative, that it was "dedicated" to public use when Petitioners dredged a channel connecting it with adjacent navigable waters. Neither contention withstands examination.

In its natural condition, Kuapa Pond was a shallow inland water body nonnavigable under the controlling "navigability-in-fact" test of *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871), as this Court's own opinions establish. *Leovy v. United States,* 177 U.S. 621 (1900); *Egan v. Hart,* 165 U.S. 188 (1897). It was likewise nonnavigable under *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940), for no evidence exists of any reasonable commercial need for its improvement, and the fact that Petitioners did improve it is no proof thereof (Pet. App. 23a-24a).

The fact that Petitioners at their own expense improved Kuapa Pond to support recreational navigation is irrelevant. The philosophy underlying the servitude's principles of public access and noncompensability is that public waters have "always" been subject to the servitude. *E.g., United States v. Rands,* 389 U.S. 121, 123 (1967).

Waters public in their natural condition remain public, whether or not improved. Private waters are a different matter. If publicly improved, they may become public, but if privately improved, the lack of any preexisting public right or interest prohibits public use without payment of just compensation. *United States v. Cress,* 243 U.S. 316, 321 (1917); 36 Op. U.S. Att'y Gen. 203, 213-15 (1930). Any other rule would transform a principle designed to preserve public waters into a device to expropriate private waters, "an abuse" of federal law wholly beyond its object and needs. *Veazie v. Moor,* 55 U.S. (14 How.) 568, 575 (1852).

The Government itself implicitly recognizes the correctness of this position, and realizing that no public rights existed in Kuapa Pond, attempts to convince the Court that Petitioners "dedicated" the pond to public use by connecting it with navigable waters. No basis exists for this position. There is no evidence or suggestion in the record that Petitioners "dedicated" their private property to public use. On the contrary, Petitioners have consistently excluded the public, and mere connection of Kuapa Pond to Maunalua Bay is no more a dedication of the pond than is a private land owner's connection of his garage to a public street.

No justification exists for uncompensated imposition of a servitude upon Kuapa Pond. No navigation servitude ever applied to it. No public project is involved. No public funds have been expended. No threat to public interests is presented that cannot be dealt with by regulation alone. Nor will any general public interest be served, for the most likely consequence is that private owners of small water bodies will simply forebear from future improvements and suffer present ones to deteriorate.

The inescapable result of affirmance of the Ninth Circuit's imposition of a navigation servitude upon Kuapa Pond will be appropriation of private rights, without payment of compensation, for public recreational use. An uncompensated confiscation of private fast lands for recreational purposes would never be tolerated by this Court. No different principle should apply to private waters. If the navigation servitude as defined by this Court's extant decisions should be deemed to require so unprincipled a consequence, the servitude should be limited and redefined.

REPLY TO ARGUMENT

I.

Kuapa Pond Is Private Real Property Not Subject to a Public Right of Navigation

A. Kuapa Pond, By Virtue of Vested Rights Under Pre-Annexation Hawaiian Law, is Private Real Property, the Legal Equivalent of Fast Land, and Not a Mere License to Take Fish.

The Government would have this Court believe that fish ponds were always open to the public, subject only to the owners' exclusive license to take fish and, *ipso facto,* when the fishing ceases, the public right alone remains. This proposition is false. It is founded upon a confusion of fish ponds with sea fisheries which distorts and renders meaningless the Government's entire argument as to the legal status of fish ponds.

Petitioners have cited numerous authorities and usages of Hawaiian jurisprudence which establish that fish ponds are the legal equivalent of fast land (Br. for Pet., 15-28). The Government does not contradict these authorities. Rather it admits the force of them and attempts to gain-

say them either as proof only of a private fishing right or as not binding upon the United States. The Government is wrong on both counts.

A fish pond may be any one of several types of enclosed ponds used to cultivate fish.[6] Within these fish ponds, the Hawaiians literally grew fish. They seeded them with mullet spawn, maintained the bottom, walls and water, attended to the operation of the *makaha,* or sluice grates, which prevented the fish from escaping, and harvested mature fish (Pet. App. 16a; Tr. 70-72). Fish ponds were not designed to support any sort of navigation other than that incidental to their operation and maintenance. Kuapa Pond was only about two feet deep and large areas were exposed at low tide. Harvesting was done in shallow draft boats (App. 30). Even today, after dredging, the average depth is only six feet (App. 21).

Thus, a fish pond is analogous to a dry land farm. To characterize this enterprise as nothing more than the right to take fish overlooks the very nature of the fish pond and is as misleading as calling a Kansas wheat farm the right to take wheat.

Hawaiian fisheries, on the other hand, are merely vast tracts of open ocean in which a particular chief had the right to taboo the taking of a particular fish, or to demand a percentage of the catch. Neither the fish nor the fishery are enclosed or otherwise restricted. *See Damon v. Territory of Hawaii,* 194 U.S. 154, 158-61 (1904). Fish-

---

[6] Examples include the *loko ia kalo,* which were fresh water ponds used to grow both fish and taro, and the *loko pu'u one,* which were filled with brackish water and cut off from the sea by a barrier beach (Tr. 65-67). Kuapa Pond derives its name from yet another variety, the *loko kuapa,* in which the barrier beach was reinforced by a stonewall in ancient times (Tr. 66-67, 69, 78).

eries are open to navigation and are merely rights appurtenant to the ownership of an *ahupua'a* or *ili*.[7]

Fish ponds, however, are the legal equivalent of fast land, no different from taro patches, house lots and gardens, *Harris v. Carter*, 6 Haw. 195, 197 (1877); *Kapea v. Moehonua*, 6 Haw. 49, 53-55 (1871), and form an integral part of the *ahupua'a* or *ili* in which they are located (Tr. 83, 87).[8]

These ancient distinctions were perpetuated by the Great Mahele of 1848, wherein Kamehameha III introduced Anglo-American concepts of land tenure while preserving intact the ancient forms of property. Consequently, the Land Commission, a body empowered only to settle claims to "landed property,"[9] included Kuapa Pond

[7] Report of the Committee on Fisheries, Sept. 7, 1898, appended to the Report of the Hawaiian Commission, S. Doc. No. 16, 55th Cong. 3rd Sess., Dec. 6, 1898.

[8] The Government misconstrues *Murphy v. Hitchcock*, 22 Haw. 665, 668 (1915). Contrary to the Government's assertion that *Murphy* holds a fish pond private only so long as it remains enclosed, *Murphy* actually further illustrates the rule that fish ponds are private real property. The suit arose when the purchaser of a fish pond lease at a sheriff's sale claimed title to the fish in the pond as well. The court said that the fish pond leasehold was analogous to a leasehold of a mercantile house and held that the lease did not include the stock. The court referred to fish in enclosed ponds to distinguish them from animals *ferae naturae* and concluded that although the fish in question were subject to private ownership, title to them did not pass with title to the pond. The Government's vain attempt to find support for its views in *Murphy* is based entirely on words taken out of context.

[9] The work of the Land Commission and its powers have been discussed in Petitioner's initial Brief (Br. of Pet., 18-19). The enabling legislation clearly restricted the Land Commission to "landed property" (Laws of 1854, p. 21; Civil Code p. 415) and in practice the Commission consistently refused to determine title to sea fisheries. *Carter v. Territory of Hawaii*, 200 U.S. 255, 257 (1906); *State v. Hawaiian Dredging Co.*, 48 Haw. 152, 174, 397 P.2d 593, 606 (1964).

within its award to Princess Kamamalu, Petitioners' predecessor in title (Defendants' Exhibit 3). Later, when the Boundary Commission, which had no authority to settle the boundaries of sea fisheries,[10] determined the boundaries of Maunalua, it too adhered to ancient custom and placed the seaward boundary of the Ili along the reinforced barrier beach (Defendants' Exhibit 4), which even today defines the boundary between Kuapa Pond and the sea fishery of Maunalua (App. 29).

The District Court understood the inherent difference between fish ponds and sea fisheries and recognized that Hawaiian law has always protected private ownership of fish ponds (Pet. App. 25a-28a).

The District Court's recognition of the force of Hawaiian custom and usage is in accord with the holding of this Court in *Carino v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909). In that case, brought after the United States acquired the Philippines from Spain, the government opposed a Filipino's application to register title to land his family had long occupied according to Philippine Island's customs. The government wanted the land for public and military purposes and argued that Carino had no documentary proof of title. This Court ruled in favor of Carino, remarking that native custom and long association, "one of the profoundest factors in human thought" regarded the property as private, not public. *Id.* at 459. This Court concluded

[10] Like the Land Commission, the Boundary Commission had no jurisdiction as to the sea fisheries, *Bishop v. Mahiko*, 35 Haw. 608, 658 (1940), but routinely included fishponds within approved boundaries, *In re Application of Kamakana*, 58 Haw. 632, 638-41, 574 P.2d 1346, 1349-51 (1978). The Boundary Commission is also discussed in Petitioners' initial Brief (Br. of Pet., 19-20).

that Carino ". . . should not be deprived of what, by the practice and belief of those among whom he lived, was his property. . . ." *Id.* at 463.

Fish ponds' status as the legal equivalent of fast land was a settled principle of Hawaiian law well-known to the framers of the Hawaiian Organic Act. The Hawaiian Commission, appointed by Congress to recommend legislation concerning Hawaii, prepared a special report on Hawaii's sea fisheries which opened with a narrative wherein fish ponds and fisheries are distinguished both legally and factually.[11] Congress specifically adopted the Commission's distinction in Section 95 of the Organic Act (48 U.S.C. § 506) by repealing exclusive fishing rights in Hawaiian waters, but, in accordance with long-established Hawaiian law, specifically exempting Hawaiian fish ponds.[12]

Moreover, in Section 96 of the Organic Act (48 U.S.C. § 507), Congress allowed owners to register their fisheries but empowered the Territory of Hawaii to condemn them upon compensation to their owners for the taking. Congress thereby recognized that vested rights, however foreign to American concepts, are deserving of legal protection.

The Government's mistaken characterization of fish ponds as merely the right to take fish overlooks the entire legal history of the subject and would have the ironic effect of denying to fish pond owners the same guarantee against public taking without just compensation afforded fishery owners by Congress in Section 96 of the Organic Act and assured by this Court in *Damon v. Territory of Hawaii,* 194 U.S. 154, 158 (1904), and *Carter v. Territory of Hawaii,* 200 U.S. 255, 256-57 (1906).

[11] Report of the Committee on Fisheries, note 7, *supra.*

[12] The Government incorrectly asserts (Br. for U.S., 27 n.23) that Section 95 is no longer federal law, citing Section 15 of the Admission Act, Pub. L. No. 86-3, 73 Stat. 11, which repeals "Territorial laws." Such laws are defined as ". . . all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii prior to its admission into the Union, ..." Section 95, however, was no mere governmental measure, but rather an essential recognition of pre-Annexation vested rights. It remains in effect and is still codified as 48 U.S.C. § 506.

The Government's position that fish pond owners have title only to the bottom is equally spurious. It is self-evident that water is an essential component of a fish pond. To declare it public is inconsistent with historical usage and the very essence of the property right.

The Government also disparages post-Annexation Hawaii authorities as state law not binding on the federal government. On the contrary, to the extent that the Hawaii court has elucidated pre-Annexation Hawaiian property law, its decisions are conclusive even as to the federal government. *See Knight v. United States Land Association,* 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy,* 138 U.S. 656, 670-72 (1891). The inquiry should be directed to whether the claimed property right antedates Annexation, not to the date of the Hawaii court's decision describing the right.

The Government's contention that a fish pond remains private only so long as it is used to raise fish is only a restatement of its mistaken view that fish ponds are the same as fisheries. As the Hawaii Supreme Court's recent decision in *In re Application of Kamakana,* 58 Haw. 632, 574 P.2d 1346 (1978) demonstrates, a fish pond, like any other farm, remains private real property regardless of whether or not it is currently used to raise fish.

In *Kamakana* the Hawaii Supreme Court affirmed Land Court (Torrens System) title to Kanoa Pond, although

that fish pond is dilapidated and has not been used to raise fish since as early as 1854. Kanoa Pond, like Kuapa Pond, is a *loko kuapa*, but the court saw no detriment to its owner's rights in the fact that the fish pond's wall was partially destroyed.

Former Hawaii Attorney General Herbert Y. C. Choy reached the same conclusion. In his opinion, a fish pond remains private property until title is lost by some legal means such as adverse possession. No public right exists except to trespass in times of emergency. Haw. Op. Att'y Gen. 57-159, Dec. 12, 1957 (Defendants' Exhibit 9). Even the Government concedes that the trespass point need not have been made if the waters are public anyway (Br. for U.S., 30-31 n.25).

In summary, Hawaii's courts, attorneys general, land commission, boundary commission and all others concerned with property title have never doubted that fish ponds, including the water within them, are a unique form of real property and the legal equivalent of fast land. Congress adopted this view in the Organic Act and the Government has not refuted it.

The District Judge, who is experienced and highly familiar with local law and local conditions, knew and understood this unusual fact of Hawaiian real property law and accorded it the legal protection it deserves (Pet. App. 25a-28a, 31a-33a). His opinion should not be lightly disregarded. *See* C. WRIGHT, LAW OF FEDERAL COURTS, § 58 at 271 (3d ed. 1976).

Given the status of fish ponds as the equivalent of fast land, the Court of Appeals and the Government have both erred. It is no more relevant whether fish are being harvested in a fish pond than it is whether corn is being

grown on an Iowa farm. They both remain private property unless and until they are lawfully acquired by the public and their owners fairly compensated.

B. Under Federal Navigation Law, Kuapa Pond Is Private, Nonnavigable In Law, And Unburdened By A Navigation Servitude.

1. Kuapa Pond was Private And Nonnavigable In Its Natural Condition.

Kuapa Pond was a distinct and independent inland water body, separated for centuries from the open sea by a permanent barrier beach formation. It was so shallow that it could be used only by flat bottom boats and no water traffic ever traveled from it to the open sea (App. 29-31; Pet. App. 16a). It was never used, nor susceptible to use, as a highway of water commerce.[13] Not even the Government so contends. The Government does contend that Kuapa Pond was navigable in its natural condition, because it was subject to tidal action, and because it was capable of improvement for use by interstate commerce. Neither point has merit.

This Court discarded the "ebb and flow" test over one hundred years ago in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). Thereafter, courts consistently applied navigability-in-fact as a uniform national standard.[14] The

---

[13] Even if raising mullet could be considered water "commerce," it was not the required "interstate commerce." *E.g., Hardy Salt Co. v. Southern Pacific Transportation Co.*, 501 F. 2d 1156, 1165-69 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Minnehaha Creek Watershed District v. Hoffman*, 449 F. Supp. 876, 883-84 (D. Minn. 1978), *aff'd on point*, 597 F.2d 617, 621-24 (8th Cir. 1979).

[14] *E.g., Leovy v. United States*, 177 U.S. 621 (1900); *United States v. American Cyanamid Co.*, 354 F. Supp. 1202, 1204 (S.D.N.Y. 1973), *aff'd on other grounds*, 480 F.2d 1132 (2d Cir. 1973); *Pitship Duck Club v. Sequim*, 315 F. Supp. 309, 310-11 (W.D. Wash. 1970); *North American Dredging Co. of Nevada v.*

Corps of Engineers itself never relied upon ebb and flow until the early 1970's and then only for regulatory purposes.[15] In any event, the ebb and flow test has no application to an independent water body such as Kuapa Pond.[16]

The Government fares no better with its argument that Kuapa Pond was reasonably capable of improvement for commercial use and therefore navigable under *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). *Appalachian* contains a refinement of the navigability-in-fact test, providing that "[a] waterway, *otherwise suitable for navigation,* is not barred from that classification merely because artificial aids must make *the highway* suitable for use before commercial navigation may be undertaken." 311 U.S. at 407 (emphasis added). This Court's opinion emphasizes that "there are obvious limits to such improvements" and that determination of reasonableness is one of degree, involving "a balance between cost and need." *Id.* at 407-08. Nothing in *Appalachian,* nor in any other opinion, suggests that a shallow water body with no outlet to navigable waters and for which there is no potential commercial need may be considered navigable because it theoretically could be improved for recreational navigation by the expenditure of millions of dollars.

Mintzer, 245 F. 297 (9th Cir. 1917); and *Chisholm v. Caines,* 67 F. 285, 292 (D.S.C. 1894). Further discussion of the American abandonment of "ebb and flow" is found in Petitioners' initial Brief (Br. for Pet., 34-36, 44-46).

[15] *See* note 5 and accompanying text *supra.*

[16] Independent water bodies have always been examined without regard to the character of adjacent navigable waters. *E.g., United States v. American Cyanamid Co.,* 354 F. Supp. 1202, 1204 (S.D.N.Y. 1973), *aff'd on other grounds,* 480 F.2d 1132 (2d Cir. 1973); *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F. 680, 682 (6th Cir. 1898). The Ninth Circuit accepted, arguendo, this position (Pet. App. 5a n.2)

As the District Court stated, the Government presented no evidence that Kuapa Pond, in its natural condition, was reasonably capable of improvement for commercial needs (Pet. App. 23a-24a).[17] Even now the Government does not seriously contend that any commercial need existed. It argues instead that Kuapa Pond is navigable because Petitioners, as part of a surrounding residential development and at their own extraordinary private expense, have made it so (Br. for U.S., 21). The Government's interpretation would reduce the *Appalachian* test to a tautological absurdity and is worthy of no credit at all.

2. Private Improvement of Kaupa Pond Did Not Subject It to a Public Navigation Servitude.

The Government no longer relies on regulatory jurisdiction to extend the limits of the servitude, conceding that regulatory jurisdiction is broader in scope that the servitude (Br. for U.S., 23 n.18). Instead, the Government now maintains that all waters navigable-in-fact are navigable-in-law even if privately developed out of fast lands wholly with private funds. The simplicity of this argument obscures the fallacies underlying it.

A fundamental flaw in the Government's analysis is its failure to acknowledge that:

> [B]y an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural con-

[17] This case, contrary to the Government's suggestion, is the same as *Pitship Duck Club v. Sequim,* 315 F. Supp. 309, 310 (W.D. Wash. 1970), and similar cases holding that when improvement of a small water body would be "economically unfeasible," the water body is not navigable.

> dition, not as artificially raised by dams or similar structures; . . . .

United States v. Cress, 243 U.S. 316, 321 (1917).[18]

Even under *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940), the capability for improvement is examined upon the basis of the waterway's natural characteristics.[19] For this reason, the navigation servitude opinions of this Court, both early and recent, can speak of navigable waters as "always" having been subject to the servitude. *E.g., United States v. Rands*, 389 U.S. 121, 123 (1967); *Gibson v. United States*, 166 U.S. 269, 276 (1897). The Government, however, would reverse the order of examination. It seeks to determine navigability not on the water's natural condition, but on its present condition, regardless of how that present condition was attained.

The Government's argument also ignores the well-established distinction between public and private waters. The nation has a justifiable interest in preserving its public navigable waters for needs of present and future

---

[18] This Court has indeed consistently examined water bodies for navigability upon their "natural and ordinary condition." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698-99 (1899); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *United States v. Utah*, 283 U.S. 64, 82-83 (1931); *United States v. Oregon*, 295 U.S. 1, 15 (1935).

[19] In *Appalachian* this Court simply defined "natural and ordinary condition" to refer to "volume of water, the gradients and the regularity of flow" so as not to preclude consideration of reasonable improvements. 311 U.S. at 407. It did not abandon that standard.

commerce. *E.g., Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940). But, no comparable national interest exists in private nonnavigable waters. *United States v. Cress*, 243 U.S. 316, 320-27 (1917); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69-70 (1913). *See also Kansas v. Colorado*, 206 U.S. 46, 85-94 (1907) (no federal interest in appropriation of flow of nonnavigable stretch of Arkansas River).

The Government's position is inherently contradictory. While disclaiming any intent to extend the reach of the navigation servitude, it asks this Court to apply the servitude to Kuapa Pond, which has always been private, which was nonnavigable-in-fact in its natural condition, and which has never been subject to a public navigation servitude.

In an attempt to avoid this contradiction, the Government insists that Petitioners have "dedicated" Kuapa Pond to public use by "reshaping" adjacent navigable waters when Kuapa Pond was developed into a recreational marina. This argument passes neither factual nor legal muster.

First, Petitioners did not reshape any navigable waters. The boundary of adjacent navigable Maunalua Bay remains intact at the seaward edge of the barrier beach formation, exactly as it has for centuries past. There is no evidence nor any contention that Petitioners' activities in Kuapa Pond have had any material effect on Maunalua Bay or the Pacific Ocean.

Second, nothing in the record suggests that Petitioners dedicated Kuapa Pond to the public. Dedication "must

rest on the clear assent of the owner." *Irwin v. Dixion*, 50 U.S. (9 How.) 10, 30-31 (1850). Here, Petitioners and their predecessors have consistently and steadfastly excluded the public (App. 29-30; Pet. App. 16a-17a).

Moreover, the two lines of cases upon which the Government relies for its dedication argument (Br. for U.S., 35-36) actually support Petitioners' position.

One line stems from *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1876), which involves regulation only of business activities affected with a public interest. While in *Munn* this Court held that rates for storage of grain could be regulated, it did not hold that the grain elevator had been dedicated to *free* public use. Neither *Munn* nor any of its progeny holds or suggests that the Government may go beyond regulation and appropriate a business enterprise to free public use.

The other line, highlighted by *Marsh v. Alabama*, 326 U.S. 501 (1946), serves the Government no better. *Marsh* involved a "company town," "accessible to and freely used by the public in general" (*Id.* at 503). The Court held that since the town was operated as a public municipality, its owner had no right to restrict public exercise of fundamental liberties of press and religion. In the instant case, however, Kuapa Pond has not been opened to the public by its owners, and no question is presented as to exercise of constitutional rights by those persons authorized to make use of it. Further, the shopping center cases cited by the Government establish that *Marsh* has now been confined to its facts, that public access need not be afforded to areas not ordinarily open to the public, and

that even areas open to the public are not thereby dedicated to unrestricted public use.[20]

The Government's argument, reduced to its essence, is that merely by connecting Kuapa Pond with Maunalua Bay, Petitioners have dedicated it to free and unrestricted public use. The fact of connection, however, does not evidence dedication. No serious contention could be made that a private property owner dedicated his land to free public use by creating access to an adjacent public roadway, or by constructing a gateway to an adjacent public park. No more serious a contention can be made here.

Additional points raised by the Government are readily refutable. The several navigation statutes cited do not determine navigability; they merely define rights dependent upon its existence.[21] The argument that the public will not be able to distinguish between artificial and natural waterways has no substance. Kuapa Pond is a distinct inland water body, well-posted and secured. The ancient barrier beach remains intact. A low highway bridge spans

---

[20] *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972). *See also Hudgens v. NLRB*, 424 U.S. 507, 512-21 (1976).

In *Logan Valley Plaza*, this Court noted that access to property "not ordinarily open to the public" may be denied altogether. 391 U.S. at 320. In *Lloyd Corporation*, this Court limited *Logan Valley Plaza*, and rejected the *Marsh* dedication argument as "attenuated" as applied to that case. 407 U.S. at 569. *Hudgens*, which the Government fails to cite, goes even further, greatly limiting and perhaps overruling *Logan Valley Plaza*. Thus, these cases do not support compelled public access to Kuapa Pond. They in fact negate the Government's contention that Petitioners have dedicated Kuapa Pond to public use.

[21] 33 U.S.C. § 1 (Secretary of the Army may restrict public use of "the navigable waters of the United States"); 33 U.S.C. § 565 (private persons may "improve any navigable river, or any part thereof" on approval of plans by the Secretary of the Army and Chief of Engineers of the Army); 33 U.S.C. §§ 21-59(k) (Congressional enactments withdrawing certain navigable waters from public use).

the narrow entrance channel. The public has encountered no difficulty discerning the boundary in the past and will encounter none in the future.

Ultimately, the Government asks this Court to sustain an unprecedented and unjustified extension of the navigation servitude to private waters never within its scope, simply because the Government believes that extraordinary private efforts have made them desirable for public use.[22] Such an inequitous doctrine could be applied any time private efforts made private waters, or fast lands for that matter, susceptible to public recreation. A servitude born out of a salutary national need to preserve public highways of water commerce would be transformed into an unprincipled device for the uncompensated appropriation of private waters and become an abuse of national power wholly beyond its object and needs, *See Veazie v. Moor,* 55 U.S. (14 How.) 568, 575 (1852); *United States v. Cress,* 243 U.S. 316, 319-27 (1917); and 36 OP. U.S. ATT'Y GEN. 203, 213-15 (1930).[23]

---

[22] Petitioners have no quarrel with the Government's position that *public* waters privately-improved must *remain public* under 33 U.S.C. § 565. They rightfully point out, however, that it is one thing for the public to guard against private appropriation of public waters and quite another for the public to claim a servitude in private waters privately-improved. The statute indeed makes no claim to private waters and by this omission itself suggests Congressional recognition of Petitioners', not the Government's, position.

[23] The Government dismisses *Veazie* as a case involving improvement of a wholly internal river without direct connection to the sea (Br. for U.S., 25-26 n.22). But the purpose and effect of the improvement was to connect the Penobscot's upper stretches with the sea, by canal and rail (55 U.S. at 571-72). The reason of the Court's ruling there applies with equal logic to Kuapa Pond, which is also an internal water body connected to navigable waters solely by private enterprise. *See* 55 U.S. at 575.

The Government also makes light of the 1930 Attorney General Opinion on the Illinois State Waterway system as

II.

The Imposition of a Public Navigation Servitude Upon Kuapa Pond Constitutes a Taking of Private Property For Public Use Without Just Compensation

In arguing that it has "taken" no private property, the Government persistently asserts that Petitioners had nothing to be taken and that it has taken nothing from them. It disregards the fifth amendment limitation and thereby suggests that the servitude may be exercised in a constitutional vacuum. The servitude, however, is unquestionably limited by the fifth amendment, and private property rights of Petitioners will in fact have been "taken" by imposition of a servitude upon Kuapa Pond.

A. The Navigation Servitude Is Limited By The Fifth Amendment.

The fifth amendment directly proscribes federal taking of "private property . . . for public use, without just compensation." [24] No express immunity is accorded the navigation servitude and decisions of this Court establish that none is to be implied.

---

involving "entirely artificial" portions of a canal and suggests that the same opinion recognizes a complete federal right to appropriate without payment privately-improved nonnavigable waterways (Br. for U.S., 38 n.29). It is wrong on both points. The appropriation language of the opinion was restricted to improved *navigable* streams (36 OP. U.S. ATT'Y GEN. at 213, 214). And no basis exists for a distinction between fast lands and *nonnavigable* waters, each of which has been held private by this Court, an oversight likely attributable to the Government's failure to cite or discuss *United States v. Cress* in its Brief.

[24] U.S. CONST., amend. V.

The navigation servitude is part of the broader congressional power over commerce which is no more absolute or unfettered than other legislative powers. As the Court held in *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1893):

> Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation. . . .

See also United States v. Cress, 243 U.S. 316, 326-27 (1917); *Scranton v. Wheeler,* 179 U.S. 141, 153 (1900).

B. The Imposition Of A Navigation Servitude Upon Kuapa Pond Is A Taking of Private Property.

The Government's argument that it is not taking any private property of Petitioners—just preventing obstruction of lawful public navigation—is pure legal sleight of hand. Imposition of a servitude does take private property. "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, Rock Island & Pacific Railway Co. v. United States,* 284 U.S. 80, 96 (1931). *Accord, United States v. Dickinson,* 331 U.S. 745, 748 (1947); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 808 (1950).[25]

The confiscation in this case is manifest. Imposition of the servitude will transform private property into public. Petitioners will be entirely deprived of the fruits of their

[25] It makes no difference whether the servitude is imposed by judicial declaration rather than legislative enactment. *See Hughes v. Washington,* 389 U.S. 290, 294-98 (1967) (Stewart, J., concurring).

substantial investment without any recompense.[26] And to compound the injury, the Government expects Petitioners to continue to maintain these improvements (App. 26).[27] However strongly the Government may desire free public use of Kuapa Pond, it may not constitutionally extend the servitude beyond its natural scope, save by condemnation and payment of just compensation. *United States v. Cress,* 243 U.S. 316, 321, 326-27 (1917); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 808 (1950). *See also Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893).[28]

[26] Petitioners had expended $8,981,005 by time of trial in development of Kuapa Pond (Defendants' Exhibit 31).

[27] Maintenance has been supported by fees paid by marina lot lessees and boat owners of $72.00 per year (App. 25-26).

[28] The Government's distinction of *Monongahela Navigation Co.* as resting upon estoppel is not well-taken in the circumstances of this case. That distinction has been applied in cases in which private parties have sought to prevent government activities in navigable waters inimical to their own private interests. It has no application in a case like the present where the Government seeks to take over private improvements and put them to public use. *See Louisville Bridge Co. v. United States,* 242 U.S. 409, 421-23 (1917). Moreover, the Monongahela River was conceded by all to be a navigable stream. Even if conduct akin to estoppel might be necessary for compensation for improvements in public waters, still none should logically be required as a predicate for compensation for improvements in private waters such as Kuapa Pond. In any event, the Government itself was well-advised of the extensive improvements to Kuapa Pond, but never required permits for work in the pond itself, as opposed to work in adjacent navigable Maunalua Bay (App. 56-60, 66-67); its conduct was as inviting as a practical matter as the specific legislative invitation involved in *Monongahela Navigation Co.*

C. The Equitable Principle Underlying The Fifth Amendment Protection Requires That The Public Bear The Burdens Of Public Benefits.

This Court has always been mindful that "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Government's insistence upon free public access to Kuapa Pond ignores this principle.

Uncompensated appropriation of private fast lands for a public park would never be tolerated by this Court. Decisions have consistently required the public, not private citizens, to bear the financial burden of public recreational facilities. No valid reason exists why any different rule should apply with respect to private waters desired for a public water playground.

III.

Extraordinary Private Loss and No Public Gain Will Result From Application of a Public Navigation Servitude To Privately-Improved Private Waters

Extraordinary private loss will inevitably be suffered by imposition of a public navigation servitude upon privately-improved private waters. The principle espoused by the Government will extend to innumerable small water bodies heretofore maintained as the private property of their owners. Owners of existing improvements will be directly deprived of their investment, and owners of other waters will incur significant depreciation in the value of their property. The owners' ability to protect their property by private regulation will be supplanted and no governmental substitute can reasonably be expected to fill this void. Further noncompensable losses, ranging from destruction of property by public users, to increased deterioration of facilities by overuse, to major long-range environmental problems may be anticipated.

No significant public gain counterbalances this great private loss. No public project is proposed. The public interest in preserving adjacent public waters is already amply protected by regulation. The public has no reasonable expectation of use of such private waters, and free public access cannot justify itself as its own end. Any apparent public gain is illusory. The consequence of affirmance of the Government's position will be forebearance from future improvement of private waters and abandonment of presently existing improvements. Private owners cannot be expected to bear the burden of improving and maintaining private waters for public benefit. Private initiative will be stifled. No legitimate federal interest or policy will be served by extension of the navigation servitude to privately-improved private waters. The only effect will be appropriation of these private waters without payment of one cent of compensation. This blatant imposition of public burdens upon private shoulders should not be tolerated by this Court.

CONCLUSION

The judgment of the Court of Appeals reversing the District Court's denial of an injunction mandating public access to Kuapa Pond should be reversed.

Respectfully submitted,

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
810 Richards Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
ROBERT BRUCE GRAHAM, JR.
HAMILTON, GIBSON, NICKELSEN, RUSH & MOORE
20th Floor Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE ET AL.,

Petitioners.

—V.—

UNITED STATES OF AMERICA

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

CHARLES D. MARSHALL, JR.
MILLING, BENSON, WOODWARD
HILLYER, PIERSON & MILLER
1100 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Attorney General Opinions:

Constitution Provisions:

Statutes:

Regulations:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE ET AL.,

Petitioners.

—V.—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

I.
QUESTION

Does the public have a right of access to a private waterbody, which is rendered navigable by improvements made with private funds for private purposes on private property, without compensation to the owner? Subsidary to this question is whether the navigation servitude is inseparable from federal regulatory jurisdiction under the Rivers and Harbors Act of 1899.

II.
INTEREST OF AMICUS CURIAE

Presented to this Court for review is the holding of the Ninth Circuit Court of Appeals that federal regulatory jurisdiction under the Rivers and Harbors Act (33 U.S.C. §401, et seq.) does extend to a privately owned natural waterway which is made navigable with private funds, and that a public right of use of such a waterway is inseparable from federal regulatory jurisdiction under that Act. *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir. 1978), cert. granted, 78-738.

Louisiana Landowners Association, Inc. (the "Association") is a nonprofit corporation composed of 500 members who are organized for the purpose of the protection and advancement of the right of private property owners. There are numerous private waterways situated on property owned by members of the Association. Many of these waterways are artificial canals, which were constructed to provide access for mineral and timber operations, and for drainage, irrigation, reclamation, trapping and recreation activities. Certain of these waterways originally may have been non-navigable sloughs, ditches, bayous or creeks which were rendered navigable through improvements made by their owners. Such waterways have historically been treated under Louisiana law as the private property of the individual landowner on whose property they are located, subject to such landowner's exclusive regulation of its use. The members of the Association will be directly affected by a decision of this honorable Court of the issue as to whether the public has a right of use of such waterways without compensation to the owners.

Additionally, this Court's decision will affect many trappers whose income is derived from trapping operations conducted on the property of members of the Association traversed by many such waterways. Such areas, which are usually marsh and swamp lands, harbor abundant wildlife, including waterfowl, fish, reptiles, commercial furbearing animals and other quadrupeds. Trapping commercial furbearing animals is and has been a source of livelihood for many people trapping lands traversed by such waterways.[1] These people secure trapping rights from the property owners, usually in the form of a trapping lease, which customarily is granted for a nominal consideration.

The real benefit to the landowner is not the small amount of money paid by the trapping lessee; it is the trapper's possession of the landowner's property which prevents loss of title through adverse possession of others. Adverse possession is often a real problem because of the remoteness and inaccessibility of the property, with very few natural monuments that indicate property lines. A trapper, however, knows his leasehold and its boundaries; and he protects his leasehold from trespassing poachers because they threaten the livelihood of himself and his family. Moreover, trappers also serve a useful conservation function by protecting the environment and by preserving other forms of wildlife from indiscriminate depletion.

If this honorable Court were to hold that waterways located on private property and made navigable with private funds for private purposes are subject to public access and use, the effect on the trapping industry could be devastating, as it would be virtually impossible to prevent indiscriminate trespassing and poaching, with their concomitant deleterious effect on the marsh and swamp

[1] In 1978, over 12,000 trapping licenses were issued by the State of Louisiana. In 1977-78, trappers took over 3,690,000 pounds of commercial furbearing animal meat and 3,700,000 pelts, with a combined value of $13,300,000 (which was down from $24,700,000 in 1976-77). Statistics from Louisiana's Department of Wildlife and Fisheries.

ecosystems. Since many members of the Association have granted trapping leases affecting their property, the decision of this honorable Court in this cause is of great interest to the Association for that additional reason.

III.
ARGUMENT

A. The Exercise of Powers Derived From the Commerce Clause is Limited by the 5th Amendment

The Circuit Court held that Kaiser Aetna's marina is subject to regulatory jurisdiction under the Rivers and Harbors Act of 1899 (33 U.S.C. §401, et seq., herein the "RHA"), and, as a result thereof, the so-called navigation servitude automatically attaches thereto affording a public right of access without compensation to the owners.

The Commerce Clause (art. 1, §8, cl. 3) of the Constitution grants to the United States the power to *regulate* commerce between the states upon "all navigable waters of the United States" to assure that the same remain free and unobstructed public highways. *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25, 18 L.Ed. 96, 99 (1866). Congress has delegated the duty to protect and preserve navigable waters of the United States as public highways to the Department of the Army, United States Corps of Engineers under the RHA. Nevertheless, that power, regardless of how it is exercised, is limited by the 5th Amendment to the Constitution which guarantees that no person shall be deprived of property without due process of law and just compensation. "Confiscation may result from a taking of the use of property without compensation quite as well as from taking of the title." *Chicago R. I. & P. R. Co. v. United States*, 284 U.S. 80, 96, 76 L.Ed. 177, 186 (1931); cf. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 53 L.Ed. 1024 (1909).

While public access to and use of navigable waters of the United States is derived from regulatory powers conferred by the Commerce Clause, in exercising that power, Congress must assure that private property rights protected by the 5th Amendment are not abridged:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.
>
> * * *
>
> "All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all." *Scranton v. Wheeler*, 179 U.S. 141, 153-154, 162, 45 L.Ed. 126, 133-134; 137 (1900). See also *Monongahela Navigation Company v. United States, 148 U.S. 312, 37 L.Ed. 463 (1893)*

The District Court considered the issue of whether a public right of access to Kaiser Aetna's marina was afforded under the navigation servitude to be separable from the issue of whether the marina was subject to regulation under the RHA. The Circuit Court however considered these issues to be inseparable in holding the servitude ap-

plied to any waterbody subject to RHA jurisdiction. A brief examination of the origin and application of the navigation servitude doctrine will point up the Circuit Court's misapprehension in treating these issues as inseparable because of the Constitutional constraints placed upon exercising the navigation servitude where private property rights are affected as a result thereof.

B. The Navigation Servitude Is Limited by the 5th Amendment

The power to regulate commerce under the Commerce Clause confers upon the United States a "dominant servitude" over the bed and flow of "navigable waters of the United States" to aid navigation thereon and thereover. *United States v. Kansas City Life Insurance Co.*, 399 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967); cf. *United States v. Doughton*, 62 F.2d 936 (4th Cir. 1933). When the navigation servitude is lawfully exercised by the United States, no compensation for damage to, or deprivation of, private property rights is required because they are subordinate to the United States' power to protect and preserve navigable waters of the United States as public highways of interstate commerce. *United States v. Kansas City Life Insurance Co.*, 399 U.S. 799; *United States v. Chicago M. St. P. & P. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913).

Because the application of the servitude may result in a deprivation of private property rights, this honorable Court early on mandated that it should never be exercised in a Constitutional vacuum; the limitations imposed by the 5th Amendment on any exercise of power derived from the Commerce Clause must always be observed:

> "The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give affect to that right, is so fully established, and is so amply illustrated by recent decisions of this court that a mere reference to the cases will suffice***(Citations omitted).
>
> "(T)his rule, like every other, has its limits, and in the present case, which require us to ascertain the dividing line between public and private right, it is important to inquire what are 'navigable streams' within the meaning of the rule"... *United States v. Cress*, 243 U.S. 316, 320-321, 61 L.Ed. 746, 750 (1917).[2]

See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 37 L.Ed. 463 (1893); *United States v. Rands*, 389 U.S. 121. In *Monongahela Navigation Company*, this Court stated:

> "Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation." 148 U.S. at 336, 37 L.Ed. at 471.

---

[2] This Court later limited its holding in the *Cress* case to the facts there disclosed in the decision of *United States v. Chicago, M. St. P. & P. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941). That limitation, however, was not directed to the 5th Amendment constraints on the exercise of the navigation servitude.

C. The 5th Amendment Precludes Application of the Navigation Servitude to Private Waterbodies Rendered Navigable With Private Funds For Private Purposes

The Daniel Ball established the test of navigability of rivers and streams which constituted "navigable waters of the United States" for purposes of admiralty jurisdiction and regulatory jurisdiction under various acts of Congress as those waterways which are, in their ordinary condition, navigable in fact and form part of a continuous navigable highway of commerce between the states. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999, 1001 (1870).

The Daniel Ball's test of navigability was modified in *The Montello*, 87 U.S. (20 Wall.) 430, 22 L.Ed. 391 (1874), holding a once navigable in fact river did not lose its navigable character by reason of artificial obstructions; in *Economy Light and Power Company v. United States*, 265 U.S. 113, 65 L.Ed. 847 (1921), holding that a water body remains navigable for regulatory purposes even though it subsequently may become non-navigable because of a change in conditions or the presence of artificial constructions; and in *United States v. Apalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940) holding an entire waterway navigable where non-navigable portions could be made available for commercial interstate navigation with "reasonable improvements". *Appalachian* was the most significant modification of *The Daniel Ball* test of navigability, but nothing in that decision suggests that the natural waterbodies which can be made navigable by reasonable improvements contemplated by this honorable Court included not only those made navigable for public purposes with public funds, but also privately owned waterbodies made navigable with private funds for private purposes.

All of these cases concerned rivers and streams totally or

at least partially navigable in their natural conditions, not private waterbodies either cut through private property or non-navigable existing waterbodies made navigable by artificial means at great private expense. It can hardly be argued that turning a shallow non-navigable and privately owned fish pond into a private marina through extensive construction and financial investment by the owners is a "reasonable improvement" of an existing natural waterway contemplated by this honorable Court in announcing its decision in *Apalachian*.

In *United States v. Cress*, 243 U.S. 316, 61 L.Ed. 746 (1917), this Court followed *The Daniel Ball* concept of navigability in speaking of those water bodies to which the navigation servitude attached, but recognized the distinction that such rivers and streams must also be navigable in their *natural* condition:

> "That the test of navigability in fact should be applied to streams in their natural condition was in effect held in The Daniel Ball, 10 Wall. 577, 19 L.Ed. 999...
>
> "It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interest of navigation is a natural servitude, confined to such streams as, in their ordinary and natural conditions, are navigable in fact and confined to the natural condition of the stream." *United States v. Cress*, 243 U.S. at 323-326, 61 L.Ed. at 751-752.

The *Cress* requirement of natural navigability has been adhered to in subsequent cases involving judicial recognition of the application of the navigation servitude where

private property rights were taken or used as a consequence of its application. Representative of such recognition are: *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F. 680 (6th Cir. 1898); *Harrison v. Fite,* 148 F. 781 (8th Cir. 1906); *Goose Creek Hunting Club, Inc. v. United States,* 518 F.2d 579 (Ct. Cl. 1975); *Iowa-Wisconsin Bridge Co. v. United States,* 84 F. Supp. 852 (Ct. Cl. 1949); cf. *Utah v. United States,* 403 U.S. 9, 29 L.Ed.2d 279 (1971); *Minnehaha Cr. Watershed Dist. v. Hoffman,* 449 F. Supp. 876 (D. Minn. 1978); and *Leovy v. United States,* 177 U.S. 621, 44 L.Ed. 914 (1900). In *Harrison v. Fite,* the Court stated:

> "To meet the test of navigability as understood in the American law a water course should be . . .of practical usefulness to the public as a public highway in *its natural state and without the aid of artificial means.*" 148 F. at p. 783. (Emphasis added)

Although this Court did not amplify upon its limitation of the servitude to rivers and streams in their *natural* condition in *Cress,* or in any of its subsequent decisions adhering to the requirement, the *ratio decidendi* of the limitation seems apparent. One who takes title to the bed and/or banks of a river or stream which is navigable under *The Daniel Ball* test of navigability in *its natural condition* acquires that title subject to all advantages and disadvantages of riparian ownership, including impressment of the navigation servitude as an inchoate lien or charge on the bed, banks and surface water. Thus, the reason the Fifth Amendment requires no compensation when riparian property rights in and to the bed and bank of a river or stream navigable in its natural condition are taken is because the riparian owner's title there is imperfect; this removes the Fifth Amendment constraints from any taking of such riparian rights pursuant to an exercise of the navigation servitude. *United States v. Kansas City Life Insurance Co.,*

339 U.S. 799, 94 L.Ed. 1277 (1950). *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356 (5th Cir. 1931). However, where a waterway is either artificially created by construction through fast lands or is non-navigable in its natural condition but rendered navigable through artificial improvements, it obviously is not navigable in its *natural* condition; and ownership thereof is perfect; while it may be subject to some form of federal regulation, private property rights therein cannot be taken without compensation.

Analagous to this discussion of the dichotomy between private waterways and rivers and streams navigable in their natural condition are the private property rights recognized with respect to toll canals. While riparian owners along rivers and streams navigable in their natural condition cannot restrict public access to such waters since they constitute waters of the United States, owners of private canals may restrict public access to the same by requiring payment of tolls for the use thereof.[3] These toll canals obviously are not subject to a navigation servitude, otherwise tolls could not be charged by the owners and operators thereof.[4]

D. The Navigation Servitude and Regulatory Jurisdiction are Separable Concepts Because of the 5th Amendment Limitation on the Commerce Clause

The term navigable waters of the United States has been various definitions depending upon its legal applications.

---

[3] *Harvey v. Potter,* 19 La. Ann. 264 (1867), *Perrine v. The Chesapeake & Delaware Canal Co.,* 50 U.S. (9 How.) 172, 13 L.Ed. 92 (1850).

[4] See 36 Op. U.S. Atty. Gen. 203, (1930) where in denying a right to take over privately owned and constructed portions of a toll canal which formed a part of a waterway owned by the State of Illinois it was stated: "... Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner and deprive the latter of any investment upon it." At p. 214.

For example, regulatory jurisdiction under the RHA[5] extends to waters which are navigable in fact under *The Daniel Ball* standard;[6] to waters which in some areas are non-navigable in their natural and ordinary condition, but which can be made navigable in those areas with reasonable improvements;[7] and arguably to certain artificial waterways which are actually used in interstate commercial activities.[8] Additionally, and perhaps most noteworthy is the scope of ecological regulatory jurisdiction over navigable waters of the United States conferred under the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1311, et seq.). The term

[5] Congress delegated to the Department of the Army, United States Corps of Engineers the duty to protect and preserve the navigable waters of the United States in aid of navigation thereon and thereover. The relevant sections of the RHA are 9 and 10 (33 U.S.C. §401 and 403) which prohibit placement of structures or works in navigable waters without prior authorization evidenced by a permit from the Corps.

[6] See *Egan v. Hart*, 165 U.S. 188, 41 L.Ed. 680 (1897); *Utah v. United States*, 403 U.S. 9, 29 L.Ed.2d 279 (1971); *North American Dredging Co. of Nevada v. Mintzer*, 245 F. 297 (9th Cir. 1917); *Gulf Interstate Ry. Co. of Texas v. Davis*, 26 F.2d 930 (S.D. Tex., 1928); *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974); *United States v. Ross*, 74 F.Supp. 6 (D.C. Mo. 1947); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F.Supp. 852 (Ct. Cl. 1949); *Pitship Duck Club v. Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978).

[7] *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940).

[8] *Dow Chemical Company v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972) cert. denied, 409 U.S. 1040 (1972). In holding the artificial canal subject to RHA regulatory jurisdiction, the Fifth Circuit relied primarily on three cases concerned with the extent of Admiralty jurisdiction. See *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953); *Dagger v. U.S. N. S. Sands*, 287 F.Supp. 939 (D. W. Va. 1968); *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F.Supp. 909 (E.D. La. 1963). These cases are questionable as analogous RHA authorities since RHA jurisdiction is underpinned by the waterway being a public highway of interstate commerce; it is not made so because the owner uses it as access to navigable waters of the United States for carriage of his own goods any more than using a private driveway for access to public highways by motor vehicle traffic can be said to grant public access to the driveway.

navigable waters of the United States has been construed thereunder to include any waterbody, regardless of how shallow and how remote its interstate connexity may be, if activities therein have an impact on the environment, because "Congress clearly meant to extend the Act's jurisdiction to the constitutional limit . . . ". *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 48 L.Ed.2d 578 (1976); *Weismann v. Dist. Eng. U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *State of Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wo. 1977). See also *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978), and cases cited therein.

The 5th Amendment constitutional constraints upon the application of the navigation servitude render it much more limited in scope than the full regulatory power of Congress under the Commerce Clause. *United States v. Kansas City Life Insurance Company*, 339 U.S. 799, 94 L.Ed. 1277 (1950). Unfortunately, this limitation on the application of the doctrine has not always been carefully observed in decisions construing the scope of regulatory jurisdiction under the Commerce Clause over waters of the United States. Lower courts, commencing with the decision of *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), cert. denied 401 U.S. 910 (1971), began speaking of ecological regulatory jurisdiction under the Commerce Clause and the navigation servitude as if the two concepts were synonymous.[9]

[9] See also *United States v. Stoeco Homes Inc.*, 498 F.2d 597 (3rd Cir. 1974), cert. denied 420 U.S. 927 (1974), *United States v. Cannon*, 363 F.Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F.Supp. 1132 (S.D. Ga., 1973). *Zabel v. Tabb*, the Corps of Engineers defined "navigable waters" as waters which were navigable in fact or potentially navigable with reasonable improvements. 33 CFR §209.260 (1971). Reacting to this decision and others subsequent to it, the Corps redefined its regulatory jurisdiction to include non-navigable in fact fringe areas of waters navigable in fact, i.e., to the point of ordinary high water on banks of rivers, and to the point of mean high water on shores of tidal water bodies. See 33 C.F.R. §329, et seq. (1978).

Zabel v. Tabb was a dredge and fill permit case in which the court held regulatory jurisdiction extended to all areas within the reach of the ebb and flow of the tide, even though those areas were not navigable in fact, nor could they become navigable with reasonable improvements, because they were subject to "the paramount servitude in the Federal government," 430 F.2d at p. 215. This decision is apparently the first application of the navigation servitude to regulate private activities for purposes other than to aid navigation.

While the ecological result may be correct and cause no Constitutional trauma per se because private property rights were not taken or destroyed, but only regulated, and the Commerce Clause may afford jurisdiction to the full constitutional limit to protect the environment, the equation of the navigation servitude to regulatory jurisdiction under the broadest Commerce Clause application contravenes the purpose of the servitude, which is *only* to aid navigation. *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950). However, once the servitude is said to attach to a waterway, the concomitant is that private property rights can be taken without compensation. Moreover, predicating the attachment solely on ecological regulatory jurisdictional grounds without considering the potential affect on private property rights manifests the Consitutional confrontation between the 5th Amendment and the Commerce Clause caused by indiscriminate application of the servitude doctrine within the realm of regulatory jurisdiction without careful analysis of the purpose for which it is invoked.[10] And it is

[10] The navigation servitude, when it lawfully attaches to a navigable water of the United States, not only affords a right of public access to surface waters, but also permits the taking, use, dredging or flooding of the bed up to the point of ordinary high water on river banks (or mean high tide on the shore in tidal areas), all without compensation to property owners. If, as a result of such taking, improvements are destroyed or rights of access to the waterway are lost, no compensation is required,

that Constitutional confrontation which absolutely precludes a blanket indictment of property rights under the premise that the navigation servitude and regulatory jurisdiction over waters of the United States, however defined and applied, are inseparable. This, of course, is not to suggest that regulatory jurisdiction and the servitude cannot both attach simultaneously to certain water bodies; they can and do, but only where the water body is navigable in its *natural* condition, and where it forms a continuous highway of interstate commerce. Anything short of that will not Constitutionally sustain the servitude even though some other form of regulatory jurisdiction may Constitutionally subsist.

E. Rivers and Harbors Act Jurisdiction Does Not Extend to Privately Owned Waterways Rendered Navigable With Private Funds for Private Purposes

The term "navigable waters of the United States", at the time of the enactment of the RHA, had a well understood meaning developed under Admiralty law and expressed in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870): such waters had to be navigable in fact in their ordinary condition, and, either alone or united with other waterbodies, they had to form a continuous highway over which commerce is or may be carried on between the States. *Utah v. United States*, 403 U.S. 9, 29 L.Ed.2d 279 (1971); *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978). In *Hardy Salt*, the Court made these pertinent

even when the livelihood of the riparian owners may be destroyed. See *United States v. Rio Grande Dam & Ins. Co.*, 174 U.S. 690, 436 L.Ed. 1136 (1899); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913); *United States v. Chicago M., St. P.P. & R Co., 312 U.S. 592, 85 L.Ed. 1064 (1941); United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967).

remarks in denying RHA jurisdiction over a landlocked lake because it was not a highway of commerce between the states:

> "The phrase 'navigable water of the United States' has been used by Congress in several statutes prior to the 1899 Act, e.g. Act of July 7, 1838, ch. #91, 5 Stat. 304 . . . The term, as used in the Act of 1838, cited above, was defined in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). The Supreme Court there stated that:
>
> '. . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by *themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.*' (Emphasis added [by Court].)
>
> * * *
>
> "We conclude that a navigable water of the United States within the meaning of Sections 9, 10 and 13 of the Rivers and Harbors Act must be construed in line with the interpretation in The Daniel Ball as contemplating such a water body forming a continuous highway over which commerce is or may be carried on with other states or foreign countries by water . . ." 501 F.2d at pp. 1167-1169.

As pointed out previously, *The Daniel Ball* standard of navigability was modified in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940), where this honorable Court held that "navigable waters of the United States" included non-navigable waterways which could be made navigable for commercial interstate navigation with reasonable improvements. However, as stated in *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156, 1165-69 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974), neither the *Appalachian* decision nor any other decision which modified *The Daniel Ball* test of navigability alters the requirement that a waterway must be, or be a part of, a continuous highway of commerce between the states before RHA jurisdiction attaches. As was stated in another recent case, "It is clear that the intent and purpose of the Act (RHA) was to insure free navigability of interstate commerce through federal regulation of the subject waterbodies. Congress did not intend to extend federal regulatory jurisdiction to every spot of navigable water in the country." *Minnehaha Cr. Watershed Dist. V. Hoffman*, 449 F.Supp. at p. 884. See also *Eagan v. Hart*, 165 U.S. 188, 41 L.Ed. 680 (1897); *North American Dredging Co. of Nevada v. Mintzer*, 245 F. 297 (9th Cir. 1917); *Gulf Interstate Ry. Co. of Texas v. Davis*, 26 F.2d 930 (S.D. Tex. 1928); *Pitship Duck Club v. Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *United States v. Ross*, 74 F. Supp 6 (D.C. Mo. 1947); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F. Supp. 852 (Ct. Cl. 1949).

Admittedly, Kaiser Aetna's marina is presently navigable; however, it certainly was not navigable in its natural condition, and it is not now, nor has it ever been an

interstate highway of commerce any more than a private parking lot on private property which leads into a public street can be said to be part of a continuous interstate highway, subject to state and federal regulatory jurisdiction. Consequently, both the District Court and the Circuit Court erred in holding that Kaiser Aetna's marina is a navigable water of the United States subject to RHA jurisdiction.

IV.
CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit holding that privately owned waterbodies rendered navigable with private funds for private purposes are subject to the Rivers and Harbors Act jurisdiction and the navigation servitude is erroneous and should be reversed.

Respectfully submitted,

CHARLES D. MARSHALL, JR.
1100 Whitney Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3333
Counsel for Amicus Curiae
Louisiana Landowners Association, Inc.

OF COUNSEL:
MILLING, BENSON, WOODWARD
HILLYER, PIERSON & MILLER

see

7 7

1 8 1 9